Supreme Court, U.S.
FILED

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No. OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term 1997

MICHAEL F. b/n/f/ MR. AND MRS. BARRY F.,

Petitioners,

v.

CYPRESS-FAIRBANKS INDEPENDENT SCHOOL DISTRICT,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

(1) Is the District Court and the Fifth Circuit decision consistent with the statute's stated purpose and legislative history as to the provision of free appropriate public education services designed to meet the individualized and unique needs of disabled students, and consistent with prior decisions of this Court concerning the application of IDEA regulations to unilateral actions of parents of disabled children when the child poses a threat to himself and others and cannot be educated in that environment?

(2) Is the District Court and the Fifth Circuit decision consistent with the statute's stated purpose and legislative history as to the provision of free appropriate public education services designed to meet the individualized and unique needs of disabled students, and consistent with prior decisions of this Court concerning the application of IDEA regulations to the decision of State administration proceedings and the federal courts requirement to give "due deference" to the extensive factual findings of the state's hearing officer when the district court disregarded both the hearing officer's finding of facts and the overwhelming, unrefuted evidence that the findings were consistent with his conclusion that Michael's IEP was inappropriate and his private placement was appropriate?

(3) Is the District Court and the Fifth Circuit decision consistent with the statute's stated purpose and legislative history as to the provision of free appropriate public education services designed to meet the individualized

and unique needs of disabled students, and consistent with prior decisions of this Court concerning the application of IDEA regulations whose purpose and intent is to protect the rights of the children and their parents when the district court entered an award of costs for $6,770.05 (modified on appeal) against the parents, who prevailed at the administrative hearing; the school district appealed to the district court, and who filed a good-faith suit that was not frivolous, unreasonable, or without foundation?

Confirmation is needed by this Court that the hearing officer's decision as to the parents reimbursement was in strict compliance with IDEA regulations and appropriate and was within the equitable powers permitted under the IDEA.

Petitioner, Michael F., respectfully prays that a *Writ of Certiorari* issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered on July 15, 1997.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i
TABLE OF CONTENTS ii
TABLE OF AUTHORITIES iv
OPINIONS BELOW 1
JURISDICTION 1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2
STATEMENT OF THE CASE 2
REASONS FOR GRANTING THE WRIT 5
(1) In order to qualify for federal education funding, CY-Fair ISD must provide each child within it boundaries a "free appropriate public education" tailored to his unique needs, and assure that such education is offered in theleast restrictive environment. 5
(2)Ordinarily, courts only overturn administration determinations when the determinations are not supported by substantial evidence or are contrary to some other highly deferential standard. 8
(3)The IDEA was passed to assure that parents of disabled students would not be financially barred from enforcing a right or enjoining a wrong, and it is clearly aimed at changing the behaviors and viewpoints of school districts that continue to block implementation of special education services for disabled students. 9
CONCLUSION 11

Fifth Circuit Opinion **1a**

Findings of Fact and Conclusion of Law **32a**

Order **48a**

Decision of the Hearing Officer **55a**

TABLE OF AUTHORITIES

Page

Cases

Board of Educ. v. Illinois State Bd. of Educ.,41 F.3rd 1162 (7th Cir. 1994) 9

Board. Of Educ. Of the Hendrick Hudson Central Sch. Dist., Westchester County v. Rowley, 102 S.Ct. 3034, 3041-42 (1982) 6

Capistrano Unified Sch. Dist., v. Wartenberg, 59 F.3d 884 (9th Cir. 1995) 7

Chris D. v. Montgomery Cty. Bd. Of Educ., 753 F. Supp. 922 (M.D. Ala. N.D. 1990) 7

Clyde K. V. Puyallup Sch. Dist., No. 3, 35 F.3d 1396 (9th Cir 1994) 7

Doyle v. Arlington County Sch. Bd., 953 F.2d 100, 105 (4th cir. 1991) 8

Jenkins v. Squillacote, 935 F.2d 303 (D.C. Cir. 1991) 9

MR v. Lincolnwood Bd. Of Educ., Dist. 74, 843 F. Supp. 1236 (N.D. Illinois, E.D. 1994) 7

Rowley, 458 U.S. 176, 206 (1982) (Quoting, *Hartman v. Loudoun County Bd. of Educ.*, 24 IDELR 1171 (4th Cir. 1997) 8, 9

Wartenberg, 59 F.3d 884 (9th Cir. 1995); *Hartman*, 24 IDELR 1171 (4th Cir. 1997) 9

Other Authorities

4 U.S. Code Cong. & Admin.. News 1798, 1806 (1986) 9

Senate Report 99-112 (1985) 10

Rules and Regulations

Fed.R.Civ.P. 54(d)(1) 10

Statutes

20 U.S.C. § 1412(5) 6

20 U.S.C. § 1415 (e)(4)(B) 10

OPINIONS BELOW

On June 17, 1994, the TEA hearing officer ordered the CY-Fair ISD to reimburse the parents of Michael $15, 978.20 in educational-related costs of Michael's unilateral placement. On December 13, 1995, the United States District Court for the Southern District of Texas, Houston Division, reversed, granting judgment for Respondent, CY-Fair ISD, finding that Michael was afforded a free appropriate public education when the Individualized Education Programs (IEP) developed for Michael were reasonably calculated to enable Michael to gain an educational benefit and the parents were not entitled to reimbursement. On February 14, 1996, the district court denied Michael's motion for a new trial and awarded costs against the parents for $6,770.65 and for the school district, as prevailing party, was entitled to recover its costs. 931 F. Supp. 747. On July 15, 1997, the Fifth Circuit affirmed the decision that the parents were not entitled to reimbursement, but modified the costs to $3,837.40 and affirmed the award of costs as modified. 118 F. 3rd 245.

JURISDICTION

Judgment of the United States Court of Appeal to the Fifth Circuit was entered on July 15, 1997. This Court's jurisdiction to consider this petition is invoked pursuant to 28 U.S.C. § 1254 (1). Original jurisdiction rested pursuant to 20 U.S.C § 1415(e) and 28 U.S.C. § 1201. This petition is brought in respect to the IDEA and costs awarded a school district under an IDEA claim.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

20 § 1412. & 20 § 1415

STATEMENT OF THE CASE

Michael, then a 13 year old boy, suffers from severe Tourette's Syndrome, attention deficit hyperactivity disorder, bi-polar disorder and severe depression. As such, Michael is eligible for educational services under the IDEA as "other health impaired," for a free and appropriate public education.

Michael moved into the jurisdiction of CY-Fair ISD during the summer of 1992. Upon arrival, and Admission, Review and Dismissal (ARD) Committee convened to develop an IEP for Michael. The IEP was designed to teach Michael how to handle his behavior, but the IEP failed and Michael's behavior escalated to frightening consequences. With the IEP in place, Michael's behavior resulted in significant disciplinary notices. Michael was written up for loud hollering in class, inappropriate action toward a girl, telling other boys he was gay and how he likes to be the girl, hitting another student in the cheek, talking back to his teacher, interrupting others, licking books and paper, bothering another student by rubbing his leg, and fighting with another student.

In the second half of his first semester, his behavior became significantly worse. Michael had a fight with one student, spit on another student at lunch, and disrupted his classes by talking back to the teachers, disrupting others, refusing to sit in isolation, being extremely loud, making insulting remarks to girls around him, kung-fu kicking, and walking around the class.

Recognizing the need for more structure in Michael's day, the ARD supplemented his IEP with a content mastery class and removed Michael to a self-contained, adaptive behavior classroom for four classes and he remained mainstreamed for two classes.

During an adaptive behavior math class, Michael became physically violent, he kicked a file cabinet, desk, wall and door, threw a chair and attempted to break a fire extinguisher. The school emergency removed Michael for the rest of the day. The next day, Michael received twelve warnings in DMC for talking without permission and making obscene sexual comments. Later that same day, he became involved in a fight, hit two students, and kicked a teacher three times. Still later that day, Michael hit an assistant principal in the stomach, kicked two girls and threw the assistant principal's nameplate. For this, he received five days suspension.

On February 23, 1993, the ARD convened to discuss possible expulsion for Michael for aggression against a school administrator. However, Michael's psychologist, Dr. Rosenberg, claimed Michael's behavior was directly related to his disability and recommended home placement. Michael was placed homebound for six weeks.

On April 2, 1993, Michael returned to the adaptive behavior classroom with revisions made to his IEP with identified goals of increasing his on-task behavior and extinguishing his verbal and physical aggression. But Michael's behavior continued to escalate. Michael engaged in a screaming match in the hallway with a substitute teacher and continually interrupted his third period class. He called another student a slut and cursed the assistant principal. At lunch, he took a bite out of another boy's pizza and on two other occasions he was fighting.

Michael was not in control of his behavior in the halls at Bleyl duing the fall (his last) semester of 1993, and his behavior was destructive, demoralizing to the teachers and students, and most importantly, it disturbed the rights of others to obtain an education. For example, September 13, 1993, Michael was screaming in the hall. [TEA Admin.. Rec. 1243]; September 29, Michael got into a fight in the hall. [TEA Admin. Rec. 1280]; October 1, Michael walks in from hall screaming. [TEA Admin.. Rec. 1245]; October 4, Michael was walking in the girls hallway, after being told not to by the P.E. Teacher. [TEA Admin. Rec. 1283]; October 5, Michael could not walk alone and had to be escorted by a principle. [TEA Admin. Rec. 1247]; October 22, Michael could not walk alone and had to be escorted by a principle. [TEA Admin.. Rec. 1283]; October 27, Michael poured a can of lemonade on a teacher's head in the hallway. [TEA Admin.. Rec. 1291]; November 2, Michael refused to stop in the hallway when asked to do so by his principle. [TEA Admin.. Rec. 1296]; and Npvember 3, Michael was cited for destruction of school property in the hallway, and cursing loudly in the hallway. [TEA] Admin.. Rec. 1298]

On October 4, 1993, the ARD instituted the same IEP it had recommended at the last ARD: an adaptive behavior classroom placement for four classes with a content mastery class option. On October 5, 1993, Michael began yelling in class, crumpled pages in his book and called his teacher a fat cow and a female student a slut. When the female student told him to have some respect, he threw a book at her. She then shoved Michael and they began fighting. Michael had his knee in her chest and was pulling out her hair. For this, he received a two-day suspension.

When Michael began his adaptive behavior program, nothing changed. From October 7, 1993

through November 4, 1993, Michael exhibited no progress. Michael did not attend CY-Fair ISD after November 4, 1993. He enrolled at Provo Canyon School on November 8, 1993. On November 18, 1993, Michael's parents requested an ARD to request that the school district approve Michael's unilateral placement. The ARD denied the request stating that Michael's in-district educational program was reasonably calculated to confer upon him an educational benefit in the least restrictive environment. In absentia, the ARD made revisions to Michael's IEP including placing him in a social behavior class, removing him from speech class and eliminating the requirement that he dress for P.E. Michael's parents disagreed and requested a due process hearing.

The hearing officer found Michael's May 26 and October 4, 1993, IEP's inappropriate and his private placement appropriate. The district court reversed and the Court of Appeals affirmed. In addition, the district court awarded costs taxed against the parents and the Court of Appeals, modified but affirmed the costs award. From these decisions, Micheal petitions this Court for *Writ of Certiorari.*

REASONS FOR GRANTING THE WRIT

It is respectfully contended that the United States Court of Appeals for the Fifth Circuit has decided this federal question in a way that conflicts with prior applicable decisions of this Court and the stated purpose and intent of the IDEA. Further, the Fifth Circuit has decided this federal question in a way that conflicts with other Circuits reviewing similar facts.

(1) In order to qualify for federal education funding, CY-Fair ISD must provide each child within it boundaries a "free appropriate public education" tailored

to his unique needs, and assure that such education is offered in the least restrictive environment. 20 U.S.C. § 1412(5). This Court has interpreted that to mean that the IDEA guarantees only a "basic floor of opportunity" for every disabled child, consisting of "specialized instruction and related services which are individually designed to provide educational benefit." *Board. Of Educ. Of the Hendrick Hudson Central Sch. Dist., Westchester County v. Rowley,* 102 S.Ct. 3034, 3041-42 (1982). Nevertheless, "the IEP must be likely to produce progress, not regression or trivial educational advancement." *Board of Educ. Of East Windsor Regional Sch. Dist. v. Diamond,* 808 F.2d 987, 981 (3rd Cir. 1986). In short, the IEP must provide an educational benefit that is meaningful.

Meaningful educational benefit does not mean form over substance. The IDEA does not require a child to spend years in an educational environment that is inadequate and impedes his progress simply to permit the school district to try every option short of residential placement. Different considerations apply when a child's behavior is so outrageous, violent, and disruptive that he prevents himself and those around him from obtaining an education, he cannot be educated in that environment. This Court needs to provide guidance to the federal courts to prevent school districts from placing form over substance.

The Fifth Circuit in stating that Michael's IEP's were reasonably calculated to provide him with meaningful educational benefits violates the intent and purpose of the Act. In pertinent part, the IDEA reads, "removal of handicapped children from the regular educational environment occurs only when the nature or severity of the handicap is such that education in regular classes with the use of supplemental aids and services cannot be achieved satisfactorily." 20 U.S.C. § 1412(5)(B).

Yet, Cy-Fair in complying with the procedural requirements of the IDEA, provided practically the same IEP, with slight revisions, to Michael when it was clear that his behavior was escalating and the IEP's were failing their essential purpose--to help Michael control his behavior.

The Fifth Circuit decision is contrary to other Courts that have applied the educational benefit test of *Rowley*, and determined that children suffering from severe behavioral disabilities cannot be educated in a mainstream environment and a highly structured program is appropriate. *Clyde K. V. Puyallup Sch. Dist., No. 3,* 35 F.3d 1396 (9th Cir 1994); *Capistrano Unified Sch. Dist., v. Wartenberg,* 59 F.3d 884 (9th Cir. 1995); *MR v. Lincolnwood Bd. Of Educ., Dist. 74,* 843 F. Supp. 1236 (N.D. Illinois, E.D. 1994); and *Chris D. v. Montgomery Cty. Bd. Of Educ.,* 753 F. Supp. 922 (M.D. Ala. N.D. 1990).

If this decision is allowed to stand, children in the Fifth Circuit with disabilities will lose the protection of the IDEA and grow to become burdens on society if they are not taught how to handle their behavior. This Court should review this decision and determine whether children who exhibit violent and aggressive behavior, that the school district is ill-equipped to handle, are being harmed while the school district follows the procedural safeguards without providing any educational benefit to the child. This Court should, in conformity with prior rulings as to the equitable powers contained within the IDEA and application of the statute's regulations to the unilateral acts of parents seeking to obtain a free appropriate education for their children, reinstate the hearing officer's decision.

Due deference issue

(2) Ordinarily, courts only overturn administration determinations when the determinations are not supported by substantial evidence or are contrary to some other highly deferential standard. Here, the administration determinations were unchallenged and unrefuted. The hearing officer heard eleven (11) days of testimony and made detailed factual findings regarding all aspects of Michael's educational experience. The officer's analysis carefully incorporated those findings and specifically addressed the evidence the school district presented in support of their position. The district court, however, set all this extensive effort and review aside and found that Michael was receiving an educational benefit even though his in-school behavior would have prevented him and those around him from benefitting from any educational instruction.

Federal courts must accord "due weight" to state administrative proceedings. *Rowley,* 458 U.S. 176, 206 (1982) (Quoting, *Hartman v. Loudoun County Bd. of Educ.*, 24 IDELR 1171 (4th Cir. 1997). "Administrative findings in an IDEA case "are entitled to be considered prima facie correct," and "the district court, if it is not going to follow them, is required to explain why it does not." *Doyle v. Arlington County Sch. Bd.,* 953 F.2d 100, 105 (4th cir. 1991). While the district court opinion references the hearing officer's decision, its failure to specifically address the behavioral findings in the hearing officer's opinion does not reflect the teachings of *Rowley,* that state proceedings must command considerable deference in the federal courts. The fact remains, that the district court gave little or no weight to the disruptive effects of Michael's behavior in the classroom. Michael behaved exactly the way the administration record purports and the school district accepted this behavior in

detriment to his free appropriate public education tailored to his specific needs.

In accord with the "due deference" teachings of *Rowley,* are the Ninth, Fourth and the Seventh Circuits. *See, Wartenberg,* 59 F.3d 884 (9th Cir. 1995); *Hartman,* 24 IDELR 1171 (4th Cir. 1997); and *Board of Educ. v. Illinois State Bd. of Educ.*,41 F.3rd 1162 (7th Cir. 1994). This Court should reexamine the record in this matter, and not be mislead by paid expert opinion who never saw Michael or observed Michael in a classroom setting when the administrative record demonstrates that Michael could not receive an education in that environment.

Costs issue

(3) The IDEA was passed to assure that parents of disabled students would not be financially barred from enforcing a right or enjoining a wrong, and it is clearly aimed at changing the behaviors and viewpoints of school districts that continue to block implementation of special education services for disabled students. The legislative history strongly endorsed the principal that parents or legal representatives of handicapped children must be able to access the full range of available remedies in order to protect the handicapped children's educational rights. 4 U.S. Code Cong. & Admin.. News 1798, 1806 (1986).

The district court's award of $6,770.05, affirmed and reduced by the Fifth Circuit, is unjust and shocks the conscience of parents and children within the purview of the IDEA. "It would be absurd to imagine a trial court ordering parents to reimburse a school system for the costs of a hearing examiners erroneous placement of the child, and any such order would clearly be an abuse of discretion." *Jenkins v. Squillacote,* 935 F.2d 303 (D.C. Cir. 1991).

The district court noted; "although the IDEA does not provide for the award of costs to a prevailing party,

the IDEA does not bar such an award." However, the IDEA specifically limits the award against the parents to suits brought by parents which are frivolous, unreasonable or without foundation. 4 U.S. Code & Cong. & Admin.. News 1798, 1804 (1986). As this appeal demonstrates, this case is not without merit.

The IDEA is a specific statute governing the entire procedures and remedies of cases brought under this Act. 20 U.S.C. § 1415 (e)(4)(B), states in pertinent part that, "In any action or proceeding brought under this subsection, the court, in its discretion, may award reasonable attorney fees as part of the costs to the *parents, or guardian of a child, or youth with a disability who is the prevailing party."* The statute does not contemplate the awarding of costs to the school district who is the prevailing party against the parents whom the statute was designed to benefit. Fed.R.Civ.P. 54(d)(1) conflicts with the purposes of the IDEA. There is little question that the IDEA was to be the exclusive remedy for suits of this kind and is intended to preempt other federal statutes in conflict.

The district court's action is unjust and will have a chilling effect on parents ability to challenge the school district's placement of their child. Congress long ago recognized that the school districts have the resources to drag out litigation and force parents to abandon their cause and give up the rights of their children to attend school and receive a decent education for fear of the costs. Senate Report 99-112 (1985), pg. 17-18. If this ruling is not reversed, this message will be a sound of victory for the school districts and fear and intimidation to the parents that they may have to settle for an inappropriate education for their children in direct contravention of the IDEA, but hopelessly insolvent to pursue their rights. Allowing the district court's award of costs to stand

would do serious harm to congressional intent and the purpose of the IDEA, while assuring parents will think long and hard before pursuing their rights under the statute in fear of costs being awarded the school district.

CONCLUSION

For all the reasons stated, Petitioner, Michael F., prays that this Court grants a *Writ of Certiorari* to review the decision of the United States Court of Appeal for the Fifth Circuit.

Respectfully submitted,

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 96-20221

CYPRESS-FAIRBANKS INDEPENDENT

SCHOOL DISTRICT,

Plaintiff-Appellee

versus

MICHAEL F. b/n/f/ MR. AND

MRS. BARRY F.,

Defendants-Appellants.

Appeal from the United States District Court
for the Southern District of Texas

July 15, 1997

Before HIGGINBOTHAM, WIENER, and DENNIS, Circuit Judges.

WIENER, Circuit Judge:

Defendants-Appellants Michael F., by his next friend and parents, Mr. and Mrs. Barry F., ("Michael's parents") appeal from the final judgment of the district court in favor of Plaintiff-Appellee Cypress-Fairbanks Independent School District ("Cy-Fair ISD"). The action arose when Michael's parents, invoking the Individuals with Disabilities Education Act ("IDEA"),[1] sought reimbursement from Cy-Fair ISD for the costs they incurred in placing their disabled child, Michael, in a full-time private residential education and treatment facility. The school district refused Michael's parents' request, and they appealed administratively to the Texas Education Agency ("TEA"), whose hearing officer ordered reimbursement, finding that (1) the educational program crafted for Michael by Cy-Fair ISD was inappropriate under the IDEA, and (2) Michael's placement at a specialized private residential school by his parents was appropriate. After conducting further fact finding, the district court reversed the hearing officer's decision and also awarded costs to the school district. Concluding on the basis of the entire administrative and judicial record that the district court committed no reversible error when it reversed the hearing officer's decision, we affirm the court's decision on reimbursement, but modify in part its award of costs to the school district and affirm that award as modified.

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[1] 20 U.S.C. § 1400 et seq. (1997). We note that the IDEA was recently amended by Congress. See Individuals with Disabilities Education Act Amendments of 1997, P.L. No. 105-17, June 4, 1997, 11 Stat. 37. As all of the events giving rise to this action occurred before the enactment of the amendments, however, we need not consider their effect in this appeal.

I

BACKGROUND

A. Statutory Framework of the IDEA

Being a local educational agency responsible for complying with the IDEA as a condition of the State of Texas' receipt of federal education funding, Cy-Fair ISD must (1) provide each disabled child within its jurisdictional boundaries with a "free appropriate public education" tailored to his unique needs,[2] and (2) assure that such education is offered, to the greatest extent possible, in the educational "mainstream," that is, side by side with non-disabled children, in the least restrictive environment consistent with the disabled student's needs.[3] The "free appropriate public education" that a disabled student is entitled to receive under the IDEA must be tailored to his particular needs by means of an "individual educational program" ("IEP"), a written statement prepared at a meeting attended by a qualified representative of the school district, a teacher, the child's parents or guardians, and, when appropriate, the child himself.[4] In Texas, the persons charged with preparing an IEP are known collectively as an Admissions, Review and Dismissal Committee ("ARD Committee").

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2 20 U.S.C. §§ 1400(c) and 1412(1); Teague Indep. Sch. Dist. v. Todd L., 999 F.2d 127, 128-29 (5th Cir. 1993).

3 Id.; 20 U.S.C. § 1412(5).

4 20 U.S.C. § 1401(20).

The "free appropriate public education" tailored by an ARD Committee and described in an IEP, however, need not be the best possible one, nor one that will maximize the child's educational potential; rather, it need only be an education that is specifically designed to meet the child's unique needs, supported by services that will permit him "to benefit" from the instruction.[5] In other words, the IDEA guarantees only a "basic floor of opportunity" for every disabled child, consisting of "specialized instruction and related services which are individually designed to provide educational benefit."[6] Nevertheless, the educational benefit to which the Act refers and to which an IEP must be geared cannot be a mere modicum or de minimis;[7] rather, an IEP must be "likely to produce progress, not regression or trivial educational advancement."[8] In short, the educational benefit that an IEP is designed to achieve must be "meaningful."[9]

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[5] Bd. of Educ. of the Hendrick Hudson Central Sch. Dist., Westchester County v. Rowley, 458 U.S. 176, 188-89 (1982).

[6] Id. at 201.

[7] Oberti v. Board of Educ. of Borough of Clementon Sch. Dist., 995 F.2d 1204, 1213 (3rd Cir. 1993).

[8] Board of Educ. of East Windsor Regional Sch. Dist. v. Diamond, 808 F.2d 987, 991 (3rd Cir. 1986).

[9] Polk v. Central Susquehannna Inter. Unit 16, 853 F.2d 171, 182 (3rd Cir. 1988), cert. denied, 488 U.S. 1030 (1989); see also Rowley, 458 U.S. at 192.

When a parent or guardian challenges the appropriateness of an IEP crafted by a state or local education agency and the resulting educational placement, a reviewing court's inquiry is generally twofold. It must ask first whether the state or local agency complied with the procedures set forth in the Act, and if so whether "the individualized educational program developed through the Act's procedures [was] reasonably calculated to enable the child to receive educational benefits?"[10] In those instances when a suitable or "appropriate" public educational placement is not available for a disabled child within a state or local school district, the district must pay the costs of sending the child to an appropriate private institution.[11]

In School Comm. of Town of Burlington, Mass. v. Department of Educ. of Mass.,[12] the Supreme Court held that a reviewing court may, in the exercise of the equitable authority granted to it under the IDEA, order public school authorities to reimburse parents or guardians of a disabled child for their expenditures on private schooling when they unilaterally remove the child from public education and place the child in private schooling. But reimbursement may be ordered in such situations only if the parents or guardians establish that (1) an IEP calling for placement in a public school was

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[10] Id. at 201.

[11] Jenkins v. Squillacote, 935 F.2d 303 305 (D.C. Cir. 1991) (citing School Comm. of Town Burlington, Mass. v. Dep't of Educ. of Mass., 471 U.S. 359, 369 (1985)); Alamo Heights Indep. Sch. Dist. v. State Bd. of Educ., 790 F.2d 1153, 1158 (5th Cir. 1986).

[12] 471 U.S. 359, 369 (1985).

inappropriate under the IDEA, and (2) the private school placement by the parents was proper under the Act.[13] If the reviewing court determines that the school district's IEP was appropriate, it need not reach the issue of the appropriateness of the private placement by the parents.[14]

B. Particular Facts and Proceedings

At an early age, Michael F. was diagnosed with, and began to receive medication for, Attention Deficit Hyperactivity Disorder ("ADHA"). Based on this condition, Michael was classified as "other health impaired" and was thus entitled to receive educational services under the IDEA from Cy-Fair ISD after he and his family moved there in the summer of 1992.

Michael enrolled as a sixth grader at Cy-Fair ISD's Hamilton Intermediate School (Hamilton) for the 1992-93 school year. During this school year, Michael was diagnosed with Tourette's Syndrome ("Tourette's"), a neurological or psychiatric behavior disorder typified by involuntary motor and vocal ticks. Michael's case of Tourette's is manifested by symptoms of (1) hyperactivity and decreased attention, (2) obsessive compulsive

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[13] Id. at 370; see also Florence County Sch. Dist. Four v. Carter, 114 S.Ct. 361, 366 (1993). Reimbursement will be permitted under Burlington when unilateral placement by parents is generally found to be appropriate, even though it is not "the exact proper placement required under the Act." Alamo Heights, 790 F.2d at 1161.

[14] Teague, 999 F.2d at 132.

behavior, (3) rapid mood swings, and (4) ticks and twitches.

Acting through an ARD Committee convened in August 1992, Cy-Fair ISD instituted a provisional IEP for Michael's 1992-1993 school year at Hamilton. Under this initial IEP, Michael attended regular classes and had access to a "content mastery class." In October of 1992, the ARD Committee supplemented Michael's IEP with a "behavioral plan," under which Michael's teachers could discipline him with "time-out" and "cooling off" periods when he became agitated, send him to counseling sessions with the assistant principal, or send him to special discipline management classes. Michael's parents approved both the initial IEP and the October behavioral plan.

Michael's deportment problems ebbed and flowed throughout the 1992-93 school year. During the fall semester, his misbehavior consisted mainly of relatively minor disruptions such as yelling inappropriately on the bus and in class, calling other students and himself gay, touching students on the legs in a sexual way, talking back to his teacher, licking his books and papers in class, one scuffle, and one fight. This behavior landed Michael in the principal's office, detention hall, or discipline management class on numerous occasions and also resulted in several temporary suspensions from the school bus.

Beginning in January of 1993, however, when Michael was first diagnosed with Tourette's and his medications were juggled in an attempt to reduce the severity of his Tourette's' symptoms, his behavior worsened. Not only did he continue to disrupt class and cause trouble

elsewhere in the school environment, but Michael increasingly became involved in fights, and on February 15 and 17 ---- just when a powerful and potentially beneficial drug with strong side effects was being introduced into Michael's medication regimen ---- his temper flared in two physically violent episodes. As a result of these episodes, Michael was removed from school on an emergency basis and faced possible expulsion until the ARD Committee determined, after receiving reports from Michael's attending psychiatrist and psychologist, that Michael's misbehavior was directly related to his disability. Agreeing with the recommendation of Michael's psychiatrist, the ARD Committee assigned Michael to a homebound placement for approximately six weeks so that his doctors could complete medication trials and stabilize his medical treatment, after which the Committee could reevaluate Michael's IEP.

Just before Michael's outburst of physically violent behavior in mid-February, however, the ARD Committee had resolved that Michael's needs would be better addressed with a more consistent behavioral structure throughout the day. It had, therefore, placed him in a self-contained, adaptive behavior classroom for three subjects (English/Language Arts, Math, and Social Studies),[15] while leaving him in regular education classes for Science and Physical Education ("P.E.") The ARD Committee also supplemented Michael's program by providing him with a social behavior curriculum in his

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[15] An adaptive behavior class is specifically designed to help students learn to control inappropriate behavior. The student stays in the same classroom for several subjects, and a level point structure is used which enables students to gain rewards throughout the class period by exhibiting appropriate behavior.

adaptive behavior classes, psychological counseling services, and a discipline contingency plan.

When Michael returned to Hamilton on April 2, he was again placed in a slightly expanded version of the adaptive behavior program that he had only briefly begun in mid-February. Michael's disruptive and aggressive behavior continued more or less unabated for the remainder of the school year, resulting in several short suspensions, including one for the last two days of school after he announced in class that he was going to kill his mother, spat in a student's face, hit the student, and directed obscene language at his teacher.

When the ARD Committee convened on May 26, 1993 to review Michael's situation and plan for the next school year, it learned that Michael was passing all of his courses and had made progress towards achieving all of the academic goals listed in his IEP, but had not yet achieved mastery in any academic area except for general science. On the deportment front, Michael's adaptive behavior teacher noted that Michael was able to refocus after incidents of misconduct. Largely at the insistence of his parents who feared that his continued exposure, in adaptive behavior classes, to other children with emotional and behavioral problems would harm Michael, the ARD Committee determined that Michael could be placed in the regular education program at his local junior high school for the 1993-94 school year. Michael's parents and the ARD Committee hoped that the combined effect of a new school, the intervening summer recess, and attention to medication would improve Michael's behavior. Michael's IEP for the impending school year, however, still included a number of support services and plans specifically designed to address

Michael's behavioral problems. Among these were a discipline contingency plan for teachers to use in dealing with Michael's conduct, a behavioral intervention plan, psychological counseling services, a tracking teacher to monitor Michael's progress, and a handpicked team of teachers who were to receive training on how to cope with Michael's disabilities and behavior. At the conclusion of the meeting, Michael's parents signed the Committee's report, noting their agreement with the IEP and Michael's placement for the 1993-1994 school year.

Over the summer, Michael's behavior at home deteriorated to the point that in late July his parents considered following his psychologist's advice and hospitalizing him or placing him in a summer program at a residential treatment center. But Michael's parents ultimately chose to keep him at home for the duration of the summer.

In August 1993, Michael began seventh grade at Cy-Fair ISD's Bleyl Junior High School ("Bleyl"). During his first month of school, he continued to disrupt class with some frequency, exhibited disrespect for and even directed insults at authority on occasion, and several times became entangled in fights. His misbehavior resulted primarily in "time-outs," detention hall assignments and "cooling off" sessions at the assistant principal's office, but on three occasions he was sent home from school for the rest of the day.

In light of these continuing behavioral problems, the ARD Committee convened a meeting on October 4, 1993, which was attended by Michael's parents, the chairman of the Special Education Department at Bleyl, a psychologist from the school district who had worked with Michael, an

educational diagnostician from the school district, the assistant principal at Bleyl responsible for Michael, and Michael's tracking teacher. The Committee was informed that, although Michael was passing every course but one and was receiving satisfactory conduct marks in every class but two, he was having difficulty turning in homework assignments in the majority of his courses and was still experiencing behavioral problems. The Committee therefore altered Michael's IEP, placing him in adaptive behavior classes for Math, English/Language Arts, and Texas History and leaving him in regular education classes for Science, Reading, Industrial Technology, Speech, and P.E. The Committee also determined that Michael was eligible for an optional content mastery class and modified his discipline contingency plan by providing teachers with the option of sending Michael to a discipline management class for the remainder of a class period, as opposed to an emergency removal from class, when his misbehavior escalated. Once again, Michael's parents approved the IEP that resulted from this meeting.

On the very next day of school, however, before he had even begun the new adaptive behavior program designed by the ARD Committee, Michael got in a fight with a girl in class and, before the fight was broken up, had pinned the girl to the floor with his knee and pulled out some of her hair. As a result of this incident, Michael was "emergency removed" for the remainder of that school day and the next day. Michael's parents perceived this incident as a serious escalation of Michael's behavioral problems and therefore renewed their previous consideration of alternative placements for Michael, including a residential psychiatric institution.

On October 7, 1993, Michael began his partial placement in adaptive behavior classes. He continued to misbehave on the school bus, disrupt classes on occasion, and in a few instances refuse to suit up for P.E., all of which necessitated "time-outs" and "cooling off" sessions with the assistant principal. Still, his physical aggression from this date forward until his removal from Bleyl consisted of but a single scuffle in P.E. Furthermore, during the remainder of his time at Bleyl, he was only emergency removed from school once, for half a day, after refusing to take medication and being disrespectful to a school nurse. On his own volition, Michael later apologized to the nurse for his behavior. Throughout this period, Michael ate lunch in the school cafeteria unattended and passed through the school hallways without being escorted by school staff.

Michael's academic performance during his final month at Bleyl was inconsistent but far from hopeless. A progress report issued on October 26 for the first nine weeks of school indicated that Michael was failing or had incompletes in all but one subject. Nevertheless, Michael's final report card from Bleyl, issued in November after he was removed by his parents, reflected that Michael had turned in previously incomplete assignments and was again passing in his three adaptive behavior classes (Math, English/Language Arts, and Texas History) and in one other academic course (Industrial Technology), was close to passing in two others (Reading and Science), and was only clearly failing in one (Speech). As discussed more fully below, Michael's teachers and the assistant principal have offered sensitive and detailed assessments of his academic and behavioral performances during his enrollment of approximately two months at Bleyl.

Michael's parents removed him from Bleyl and Cy-Fair ISD on November 4, 1993. On November 8, he was admitted to the Provo Canyon School ("Provo Canyon"), a 24-hour residential treatment center located in Provo, Utah. Michael remained at Provo Canyon until February 11, 1994, when his parents brought Michael back home because they could no longer afford the private institution.[16]

Meanwhile, on November 18, 1993, an ARD Committee meeting had been convened to consider Michael's parents' request that Cy-Fair ISD approve Michael's placement at Provo Canyon and reimburse them for the costs of the placement. The ARD Committee modified Michael's IEP slightly, in absentia, by deleting Speech class from his curriculum and substituting a "social behavior" class and by deleting the requirement that he change clothes for P.E. But the Committee did not accede to Michael's parents' request that the school district approve Michael's educational placement at Provo Canyon and reimburse them for the costs of this placement. The Committee concluded that his partial placement in the adaptive behavior classroom at Bleyl was the least restrictive environment in which he could receive an appropriate public education under the IDEA.

As was their right under the IDEA,[17] Michael's parents sought review of the school district's denial of their

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[16] Provo Canyon School is approved by the Utah State Board of Education, the California State Board of Education, the Wyoming State Board of Education, and the Joint Commission for Accreditation of Hospitals.

[17] See 20 U.S.C. § 1415(b)(2).

request for reimbursement in an impartial due process hearing before the TEA. A TEA hearing officer conducted eleven days of hearings in April 1993 and, in a lengthy opinion issued on June 17, 1994, found that (1) the IEPs developed by Cy-Fair ISD for Michael's 1993-1994 school year were inappropriate, (2) Michael's placement at Provo Canyon was appropriate, and (3) Michael's parents were therefore entitled to reimbursement from Cy-Fair ISD for the $15,978.20 costs of the educational and related services (but not the medical services) Michael received at Provo Canyon.

The school district in turn exercised its prerogative under the IDEA and appealed this decision to the United States District Court for the Southern District of Texas.[18] After a one day hearing in which it received additional evidence, the district court reversed the hearing officer's decision,[19] and, in a separate order, awarded $6,770.05 in costs to the school district as a matter of course under Rule 54(d)(1).[20] Michael's parents have timely appealed from the district court's final judgment and its order awarding costs.

II

ANALYSIS

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[18] See 20 U.S.C. § 1415(e)(2).

[19] 931 F.Supp. 474 (S.D. Tex. 1995).

[20] Id. at 482-84.

A. Standard of Review

When a federal district court reviews a state hearing officer's decision in an impartial due process hearing under the IDEA, the court must receive the record of the administrative proceedings and is then required to take additional evidence at the request of any party.[21] Although the district court must accord "due weight" to the hearing officer's findings,[22] the court must ultimately reach an independent decision based on a preponderance of the evidence.[23] Accordingly, the district court's "review" of a hearing officer's decision is "virtually de novo."[24] Indeed, given its adducing of new evidence, even evidence of matters that have occurred since the administrative hearing under review, the district court proceeding under the IDEA is a hybrid, akin to a "trial de novo."

We, in turn, review de novo, as a mixed question of law and fact, a district court's decision that a local school district's IEP was or was not appropriate and that an alternative placement was or was not inappropriate under the IDEA.[25] The district court's findings of underlying

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21 20 U.S.C. § 1415(e)(2).

22 Rowley, 458 U.S. at 206.

23 20 U.S.C. § 1415(e)(2); Teague, 999 F.2d at 131.

24 Id.

25 Id.; Christopher M. v. Corpus Christi Indep. Sch. Dist., 933 F.2d 1285, 1289 (5th Cir. 1991)); see also Salley v. St. Tammany Parish School Bd., 57 F.3d 458, 462 (5th Cir. 1995).

fact, such as findings that a disabled student obtained educational benefits under an IEP, are reviewed for clear error.[26] Finally, we note that in this circuit a party attacking the appropriateness of an IEP established by a local educational agency bears the burden of showing why the IEP and the resulting placement were inappropriate under the IDEA.[27]

B. The Appropriateness of the IEP's

As it is undisputed that Cy-Fair ISD complied with the procedural requirements of the IDEA in drafting and implementing Michael's IEP's, Michael's parents may only recover the costs they incurred in unilaterally placing Michael at Provo Canyon if they establish that (1) the IEPs in effect at the time that Michael was removed from Cy-Fair ISD and was in residence at Provo Canyon ---- namely the October 4, 1993 and November 18, 1993 IEPs ---- were not reasonably calculated to provide Michael with a meaningful educational benefit, and (2) the parents' placement of Michael at Provo Canyon was appropriate under the IDEA.

1. The TEA Hearing

In his carefully written decision, the TEA hearing officer articulated three primary reasons why the IEP in effect at

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[26] Teague, 999 F.2d at 131; Christopher M., 933 F.2d at 1289.

[27] Id. at 1291; Alamo Heights, 790 F.2d at 1158 (citing Tatro v. Texas, 703 F.2d 823, 830 (5th Cir. 1983), aff'd in part and rev'd in part, 468 U.S. 883 (1984)).

the time Michael was removed from Cy-Fair ISD (the October 4, 1993 IEP) was not reasonably calculated to enable Michael to receive educational benefits. First, despite his recognition that the earlier IEPs developed by Cy-Fair ISD for Michael's 1992-93 school year represented appropriate interim steps designed to benefit Michael based on the facts and information available at that time, the hearing officer found that these IEP's had not proven successful in managing Michael's behavior. Consequently, because the October 4, 1993 IEP replicated the primary tools of the previous year's inadequate programs (namely, the adaptive behavior classes and behavior management and discipline contingency plans), the October 4, 1993 plan was inappropriate. The hearing officer supported this initial finding by (1) characterizing Michael's behavior during his time at Bleyl, both before and after the implementation of the October 4, 1993 IEP, as "extreme, outrageous, and dangerous," and (2) noting that his behavior included examples of oral and physical abuse of his teachers, school administrators, and other students. Second, the hearing officer found that the absence of a meaningful educational benefit was further exemplified by Michael's generally low self-esteem and by the fact that his October 26, 1993 progress report reflected that he was either failing or receiving incompletes in all of his subjects. Finally, the hearing officer determined that (1) Michael's presence in regular classrooms was so disruptive that it impaired the education of other students, thus indicating that his needs could not be met in the regular education environment,[28] and (2) his behavior did not improve when he was placed

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[28] See Daniel R.R. v. State Board of Educ., 874 F.2d 1036, 1049 (5th Cir. 1989) (quoting 34 C.F.R. § 300.552 Comment).

in the adaptive behavior classes but continued to occur with the same frequency and level of severity in both his regular classes and his adaptive behavior classes. Taking all this into consideration, the hearing officer concluded that the only way Michael could learn to control his impulsive and aggressive behavior and therefore gain an educational benefit without significantly disrupting others was if he were placed in a highly structured, 24-hour residential treatment facility.

2. The District Court Proceeding

The district court did not attempt to refute or discredit each of the hearing officer's findings in support of his conclusion that the school district's educational program for Michael was inappropriate. Instead, following the expert opinion of Christine Salisbury, Ph.D., an educator with considerable experience in the development of educational programs for disabled children, the court posited that there are four factors that can serve as indicators of whether an IEP is reasonably calculated to provide a meaningful educational benefit under the IDEA.[29] These are: (1) the program is individualized on the basis of the student's assessment and performance; (2) the program is administered in the least restrictive environment; (3) the services are provided in a coordinated and collaborative manner by the key

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[29] Cy-Fair ISD notes that Dr. Salisbury's four factors are derived from and track the federal regulations which implement the IDEA. See 34 C.F.R. §§ 300.346(a) and 300.531-2 (assessment); 34 C.F.R. §§ 300,500 (least restrictive environment); 34 C.F.R. § 300.343-345 (team approach); and 34 C.F.R. § 346(a)(5) (demonstrated outcomes).

"stakeholders"; and (4) positive academic and non-academic benefits are demonstrated. As there is little doubt that Michael's October 1993 IEP (a) was designed with his specific behavioral and academic problems in mind, (b) placed him in educational settings with non-disabled students for at least half of every school day, and (c) involved both Michael's individual teachers and Cy-Fair ISD administrators and counselors familiar with his needs in a highly coordinated and collaborate effort, the court had no difficulty concluding ---- and neither do we ---- that the first three hallmarks of an appropriate IEP were present.

As for the fourth factor ---- demonstrable academic and non-academic benefits ---- the district court concluded that Michael's passing grades at the time he left Bleyl to attend Provo Canyon and his ability to attend lunch and pass through the halls between class unaccompanied by school staff constituted significant academic and non-academic benefits achieved by the IEP. We agree that these objective indicia of educational benefit identified by the district court are significant, and we find further support for the district court's conclusion that the October 1993 IEP was reasonably calculated to, and in fact did, produce more than a modicum of educational benefit for Michael in the opinion of those individuals who had the most immediate knowledge of his performance during his enrollment at Bleyl ---- the teachers who worked with him on a daily basis, the assistant principal who was primarily responsible for administering Michael's discipline plan, and the school psychologist who counseled Michael during this period.

3. Additional Evidence of Educational Benefit

Although we cannot recount in detail all of observations of these individuals whose professionalism and concern for Michael was clearly evident in their lengthy testimony before the hearing officer, the following highlights of that testimony are particularly illuminating. First, Laurie Fowlkes, Michael's Science teacher, testified that Michael was generally "on task," demonstrated enthusiasm by volunteering for assignments, often controlled his own behavior when he began to get agitated during lab work by asking for permission to sit down and then putting his head on his desk, and would likely have earned a grade of B or a high C in her class if he had not left Bleyl. Second, Franklin Finch, Michael's Industrial Technology teacher, testified that Michael worked well in small groups, was "on task" 99.9 percent of the time, never demonstrated inappropriate behavior except on his last day in class, and was, in Finch's opinion, trying to keep behavioral problems in check and seeking reassurance in these efforts. Third, Leona W. Henry, Michael's Reading teacher, observed Michael's behavior to be typical of adolescent boys in her class, noted that on the few occasions that warnings or time-outs were required Michael subsequently settled down, and stated that she fully expected that Michael would have passed had he remained in her class.

Perhaps the most important of all Michael's teachers at Bleyl was Michael Donnelly, an experienced member of the school's Special Education department who served as Michael's "tracking teacher" in August and September and taught Michael's adaptive behavior classes in October and early November. Donnelly testified that, during Michael's stay in his adaptive behavior classroom, Michael's ability to respond to Donnelly as a teacher and carry on a mature conversation improved. Donnelly

further observed that Michael increasingly controlled his urges to interrupt class with inappropriate comments and behavior. Donnelly also noted that, at the time Michael's parents removed him from Bleyl, he was earning passing grades in all three academic subjects taken in the adaptive behavior classes (Math, Language Arts, and Texas History). Based on all of this, Donnelly believed that the adaptive behavior classes constituted an appropriate placement for Michael because he appeared to be "buying into the system"; Donnelly and Michael had established a "good rapport"; and neither Donnelly nor anyone else at Bleyl felt endangered by Michael's presence.

Equally impressive in his faith in Michael's gradual but steady progress under the school district's IEP was Robert Fowler, the assistant principal at Bleyl who was primarily responsible for administering Michael's behavior management and discipline contingency plans and whose office Michael visited on numerous occasions. Fowler first pointed out that the frequency of the need for severe disciplinary responses to Michael's behavioral problems (i.e., emergency removal) dropped dramatically after Michael's placement in the adaptive behavior classes under the October IEP. Fowler also reported that he (1) enjoyed "a very good rapport" with Michael, (2) saw a decrease in physically aggressive and otherwise disruptive behavior after Michael was placed in the adaptive behavior classes, (3) was aware of many instances in which the discipline contingency plan worked as intended, that is, Michael successfully returned to work after an in-class "time-out," a session in his office, or a discipline management class, (4) observed some very encouraging instances of Michael's putting himself into "time-out" or taking himself to the assistant principal's

office and subsequently regaining his composure, (5) rated Michael's misbehavior as no more severe than other regular education students he saw frequently in his office, (6) found Michael's resistance to "dressing-out" for gym class to be typical of young students confronted with this requirement for the first time, which resistance was remedied under the November 18 IEP, and finally (7) did not believe that Michael posed a danger to students or staff at Bleyl.

Kenneth Greer, Ph.D., a psychologist with Cy-Fair ISD who was knowledgeable about Tourette's and had worked with approximately twenty Tourette's-afflicted students in the school district, authored a detailed report about Michael and testified about Michael's experience in the school district, based on Greer's direct observation of Michael in counseling sessions and other data. In general, Greer reported that (1) the adaptive behavior classes at Bleyl had lessened the frequency and intensity of Michael's misbehavior, in consequence of which his disciplinary referrals had decreased, (2) Michael's initial placement in regular classes at Bleyl was made largely at the request of his parents, (3) Michael was much more cooperative in counseling sessions from the very beginning of his placement at Bleyl, (4) despite his impulse control problems, Michael never posed a threat to others or a danger to the school, and (5) in Greer's view, Michael appeared to trust Mr. Fowler, the assistant principal, as someone with whom he could converse and who provided a safe harbor for him in the school environment.

Finally, we would be remiss if we failed to note the thorough testimony at the district court hearing of Bernard Rosenberg, M.D., Michael's attending

psychiatrist in early 1993. A board certified psychiatrist with extensive clinical experience treating children with Tourette's, Rosenberg testified that a placement in adaptive behavior classes for part of the school day is generally the most appropriate one for a student with Tourette's, and, in Michael's case, was particularly appropriate given the average severity of his symptoms and his relative success in his other classes at Bleyl. By contrast, a 24-hour residential psychiatric placement, Rosenberg testified, would be inappropriate because it would deprive Michael of the opportunity to learn to get along with other children and because, in Rosenberg's view, Michael did not pose a danger to himself or others.

In sum, the testimony of all of these individuals who had direct and frequent contact with Michael both in and outside the school setting provides substantial support for the district court's determination that the October 4, 1993 IEP was reasonably calculated to, and in fact did, produce meaningful educational benefits both academically and behaviorally. In addition, their testimony supports the court's rejection of the TEA hearing officer's assumption that the school district's replication of some of the educational tools briefly used during the 1992-93 school year was inappropriate in the context of the 1993-94 academic year. First, Michael's participation in the adaptive behavior classes at Hamilton was limited to the last two months of his sixth grade year. As Dr. Rosenberg explained, this period had followed a series of trying and ultimately unsuccessful attempts to modulate Michael's medications and a six-week homebound placement, events that undoubtedly disrupted the progress and structure of Michael's schooling. Second, Michael's placement in regular classes at the beginning of the 1993-94 school year reflected a

choice primarily made by Michael's parents. Third, and most importantly, Michael's experience at Bleyl, albeit too brief for a definitive assessment of its success, was unique and clearly showed a pattern, particularly once he was switched into the adaptive behavior classes, of increasingly more self-controlled behavior and respectable, although not always consistent, academic success. Given all this, the district court cannot be said to have erred in finding that the IEPs developed by Cy-Fair ISD for Michael's 1993-94 school year were reasonably calculated to produce a meaningful educational benefit for Michael.

As it is evident that the IEP's developed for Michael's seventh grade year were specifically tailored to his individual needs and placed him in the least restrictive educational environment consistent with those needs, we conclude that the district court committed no reversible error in determining that these IEPs and Michael's placement within the Cy-Fair ISD were appropriate under the IDEA.[30] We therefore need not address the

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[30] Given the strong factual support for the district court's decision, we also find that the cases specifically cited to us by Michael's parents in support of their claim that the school district's placement was inappropriate and their placement at Provo Canyon was appropriate are readily distinguishable. In Clyde K v. Puyallup Sch. Dist., No. 3, 35 F.3d 1396, 1401 (9th Cir. 1994), the Ninth Circuit found that a fifteen-year old student with Tourette's and ADHA had been properly placed by a school district, against his parents wishes, in a self-contained, off-campus facility, as opposed to mainstream classes, in light of unrefuted evidence that the student was extremely disruptive and dangerous to others and his well documented failure to obtain any education

benefits in the mainstream placement. In Seattle School Dist., No. 1. v. B.S., 82 F.3d 1493, 1497 and 1500-01 (9th Cir. 1996), the Ninth Circuit held, this time against a school district, that a residential placement, rather than mainstreaming, was appropriate for a student with various behavioral disorders who was not receiving any academic or non-academic benefits in a regular classroom, was severely disrupting class, had become so physically assaultive that she had to be placed in restraints, and ultimately was expelled by the school district. In Capistrano Unified Sch. Dist. v. Wartenberg, 59 F.3d 884, 886-87 (9th Cir. 1995), the Ninth Circuit agreed with a district court and a hearing officer that a mainstream placement lacking in consistency and structure was inappropriate for a sixteen-year old boy who suffered severe learning and behavior disorders and whose IEP's had produced nothing but failing grades and discouragement for years. In short, all three of these Ninth Circuit decisions were dictated by circumstances substantially different than those before us.

Similarly, the district court decisions in Chris D. v. Montgomery County Bd. of Educ., 753 F.Supp. 922, 929 (M.D. Ala. 1990) (program for emotionally disturbed thirteen-year old boy utterly failed to provide significant educational benefit and in fact may have been harming him), and M.R. v. Lincolnwood Board of Educ., Dist. 74, 843 F.Supp. 1236, 1238 (N.D. Ill. 1994), aff'd, 56 F.3d 67 (7th Cir. 1995) (mainstreaming not appropriate for emotionally disturbed thirteen-year old boy whose deteriorating behavior represented a regression in addition to disturbance of others), finding that more structured placements were necessary, were also based on distinguishable fact patterns. Much closer factually to the case at bar were the district court decisions in Hall v.

issue whether Michael's parents' placement of Michael at Provo Canyon was appropriate.[31] Accordingly, we affirm the district court's reversal of the hearing officer's ruling that Cy-Fair ISD must reimburse Michael's parents for the cost of sending Michael to Provo Canyon.

C. Award of Costs

Relying on Federal Rule of Civil Procedure 54(d)(1),[32] the district court awarded $6,770.05 in costs to Cy-Fair ISD.

Shawnee Mission School Dist., 856 F.Supp. 1521, 1528-29 (D. Kan. 1994) (IEP calling for partial placement in adaptive behavior class was reasonably calculated to produce educational benefit as demonstrated by child's academic achievement on par with his grade level and gradually improving behavior, despite continuing behavior problems at home), and Swift v. Rapides Parish Public School System, 812 F.Supp. 666 (W.D. La.), aff'd, 12 F.3d 209 (5th Cir. 1993) (same), and our decision in Teague, 999 F.2d at 132 (educational benefit of IEP designed for seventeen-year old boy with various behavior, learning and speech disorders evidenced by testimony of student's teacher and school psychologist, fact that student advanced in terms of grade level, and student's increasing ability to focus on particular tasks).

[31] Teague, 999 F.3d at 132.

[32] Rule 54(d)(1) provides:

Except when express provision therefor is made either in a statute of the United States or in these rules, costs other than attorneys' fees shall be allowed as of course to the prevailing party unless the court otherwise directs . . . .

Michael's parents have challenged this award on a number of grounds. We generally review a decision of the district court to award costs for abuse of discretion.[33] We review the court's discrete factual findings for clear error.

In the district court and here on appeal, Michael's parents have principally argued that the district court's substantial award of costs is inequitable and violates the spirit if not the letter of the IDEA, given the procedural posture of this case. Michael's parents emphasize that it was Cy-Fair ISD which filed suit in district court to appeal the state hearing officer's determination in favor of the parents. Thus they contend that the district court's award of costs here, if approved, would have a chilling effect on the willingness of parents to contest school district decisions vitally affecting their children by putting such parents at risk of being penalized with a substantial cost assessment even when they have managed to prevail at the administrative hearing level. Other parents will now have to think long and hard, Michael's parents urge, before using the administrative procedures that Congress took great pains to make available to them under the IDEA for the protection of their children's interests.

We cannot disagree with the equitable aspects of Michael's parents arguments on this point. But, as Cy-Fair ISD has noted, the IDEA does not prohibit an award of costs to a school district as a prevailing party in district court even when the parents have prevailed at the

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Fed. R. Civ. P. 54(d)(1) (emphasis added).

[33] Alberti v. Klevenhagen, 46 F.3d 1347, 1358 (5th Cir. 1995).

administrative level.[34] Consequently, the district court could, without abusing its discretion, interpret this silence as permission to impose costs "as of course" under Rule 54(d)(1).

In this case, however, our review of the award of costs is not limited to the general propriety of the award because Michael's parents also objected to each item included in Cy-Fair ISD's bill of costs. When we review them, item by item, we find that three of these objections clearly have merit, constituting error by the district court in allowing the school district to recover some or all of the costs of the items identified by these three objections. First, Michael's parents properly objected to the $137.80 cost attributable to the school district's use of a private process server to serve both them and their attorney despite their counsel's having agreed to accept service on their behalf and not having objected to the use of service by mail. As there was nothing exceptional about the parties or the nature of this case, the district court should have denied these unnecessary private service costs.[35]

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[34] The IDEA does specifically provide that a district court "may award reasonable attorneys' fees as part of the costs to the parents or guardian of a child or youth with a disability who is the prevailing party," 20 U.S.C. § 1415(e)(4)(B) (emphasis added), but it is silent about awarding costs other than attorneys' fees to either parents or a school district as a prevailing party. Even though the doctrine of inclusio unius est exclusio allerius might well support an argument against an award of attorneys' fees under the circumstances, the issue is not before us today, for the district court did not include attorneys fees in its award of costs.

[35] See Zdunek v. Washington Metro. Area Trans.

Next, Michael's parents properly objected to $1004.00 of the $1,319.00 in witness fees and expenses attributable to Dr. Salisbury's round trip airfare. Having checked with the airline Dr. Salisbury used, the parents noted that even the seven-day advance purchase price for a Pittsburgh to Houston round trip for the date at issue was less than $385.00. The school district provided no reasonable explanation why Dr. Salisbury's plane ticket could not have been purchased at least one week in advance, particularly as there is no record evidence that the one-day hearing in the district court was either scheduled or changed at the last minute.[36] Thus, the witness fees and expenses recoverable by Cy-Fair ISD should have been reduced by $619.00, being the difference between Dr. Salisbury's actual plane fare and the maximum amount she would have had to pay for a seven-day advance fare.

Finally, Michael's parents objected to $3,657.55 in costs incident to four depositions purportedly taken by the school district in preparation for the district court hearing, which expenditures the parents assert were not "reasonably necessary."[37] The deponent in one of those

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Auth., 100 F.R.D. 689, 692 (D. D.C. 1983).

[36] 28 U.S.C. § 1821(c)(1) provides for the payment of travel expenses of witnesses who travel by common carrier, but specifically states that "a witness shall utilize a common carrier at the most economical rate reasonably available."

[37] Copper Liquor, Inc. v. Adolph Coors Co., 684 F.2d 1087, 1099 (5th Cir. 1982) (A deposition is taxable as a cost so long as "the taking of the deposition is shown to have been reasonably necessary in light of the facts

depositions was of Michael's parents' expert, Gina Novellino, Ph.D., Michael's psychologist who was unavailable for live testimony and whose deposition was introduced as an exhibit at trial. The cost of this deposition was not erroneously taxed to Michael's parents. The other depositions, however, were those of the school district's own witnesses and were not introduced at trial because of Michael's parents' objections. As the school district had to have known in advance that these witnesses would have to be called for live testimony in open court at the district court hearing, their depositions were surplusage and cannot properly be taxable to Michael's parents as "reasonably necessary" under these circumstances. Accordingly, the school district should not have been allowed to recover the $2,176.40 cost of these three depositions.

In conclusion, we hold that the district court did not abuse its discretion in general when it elected to tax costs to Michael's parents, but clearly erred in its findings of fact as to the proper amounts for the three categories of costs discussed above, i.e., private process service, plane fare, and deposition expenses. We therefore conclude that the award of costs to Cy-Fair ISD should be reduced by $2,933.20, to $3,837.40.

III

CONCLUSION

Having concluded that the district court did not err reversibly in finding that the IEPs designed for Michael

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known to counsel at the time it was taken.").

and Cy-Fair ISD's resulting placement of Michael in his local junior high school were reasonably calculated to produce a meaningful educational benefit and were therefore appropriate under the IDEA, we affirm the district court's reversal of the TEA hearing officer's ruling that the school district must reimburse Michael's parents for the costs of their unilateral placement of Michael in a private full-time residential school. Furthermore, we modify the district court's award of costs under Rule 54(d)(1) as discussed above and affirm that award as modified.

JUDGMENT AFFIRMED; ORDER MODIFIED and, as modified, AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CYPRESS-FAIRBANKS INDEPENDENT SCHOOL DISTRICT,

Plaintiff,

vs.

CIVIL ACTION NO. H-94-2944

MICHAEL F. b/n/f MR. AND MRS. BARRY F.,

Defendants.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Pending before the Court are plaintiff Cypress-Fairbanks Independent School District's ("Cy-Fair") Motion for Judgment and Closing Argument (Instrument #61) and defendant Michael F. b/n/f Mr. and Mrs. Barry F. 's ("Michael") Motion for Summary Judgment and Motion for Judgment (Instrument #62). This case is an appeal by Cy-Fair of a Texas Education Agency hearing officer's decision requiring Cy-Fair to reimburse Michael's parents for the cost of the unilateral placement of Michael in a residential treatment facility. Having completely and thoroughly reviewed the voluminous administrative record generated before the hearing officer and the submissions of the parties, and

having heard supplemental evidence presented at the evidentiary hearing held on September 5, 1995, and having considered the applicable law, the Court concludes that the decision of the hearing officer should be REVERSED.

The case is brought pursuant to the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. § 1401, et. seq. The IDEA requires that state school districts, in return for federal funding, must provide all handicapped children with "a free appropriate public education." 20 U.S.C. § 1412(1). That education must be "tailored to the unique needs of the handicapped child by means of an 'individualized education program' ("EP')." 20 U.S.C. § 1401 (a)(20). The IEP, which is child-specific, is a written statement describing a child's level of educational performance, annual goals, specific services to be provided, transition services needed, the period of time for which they are required, and annual evaluation procedures. ICL The child's parents or guardian, teacher, and a representative of the local education agency,[1] together formulate the IEP and review it at least annually. 20 U.S.C. § 1401(18, 19); § 1414(a)(5).

An "appropriate" education does not mean the best possible or optimal one, nor must the school district "maximize the potential" of handicapped students; rather it means "providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" at public expense, under public supervision, and approximating the State's educational standards in its regular education. Hendrick

[1] In Texas, this group of people is known as the Admissions, Review, and Dismissal Committee ("ARD").

Hudson Dist. Bd. of Educ. v. Rowley, 458 U.S. 176, 187-205 (1982); Teague Indep. Sch. Dist. v. Todd L., 999 F.2d 127(5th Cir. 1993). Rather than establishing a particular substantive level of education, the IDEA's intention is to provide the handicapped child with access to an adequate, publicly funded education. Rowley, 458 U.S. at 193-94.

Standard of Review

The Fifth Circuit has held that when reviewing a state hearing officer's decision under the IDEA, a district court should give the hearing officer's findings "due weight," but the hearing officer's findings are not conclusive. Teague Indep. Sch. Dist. v. Todd L., 999 F.2d 127, 131 (5th Cir. 1993). A district court is to perform a virtually de novo review of the hearing officer's decision and reach an independent conclusion based upon the preponderance of the evidence. Id. The Fifth Circuit has held that there is a presumption in favor of the educational placement established by a student's IEP, and the party attacking its terms should bear the burden of showing why the educational setting established by the IEP is not appropriate. Christopher M. v. Corpus Christi Indep. Sch. Dist., 933 F.2d 1285, 1291(5th Cir. 1991).

Initial Background

This case is brought by Cy-Fair as an appeal of the Texas Education Agency's hearing officer's decision in Michael F. b/n/f Mr. and Mrs. Barry F. v. Cypress-Fairbanks Indep. Sch. Dist., Docket No. 070-SE-1193. An administrative hearing was held in April 1994 concerning the claims brought by Michael's parents. His parents

sought reimbursement of costs expended for Michael's unilateral placement by his parents at a residential treatment facility in Utah, Provo Canyon School ("PCS").

Michael's family moved into the boundaries of Cy-Fair's district in the summer of 1992. He enrolled as a sixth grader at a Cy-Fair elementary school for the 1992-93 school year. For the 1993-94 school year, Michael initially enrolled at his local junior high school in Cy-Fair's district. On November 4, 1993, Michael's parents unilaterally withdrew Michael from the Cy-Fair district and placed him at PCS.

Michael had been diagnosed with bi-polar disorder, severe depression, attention deficit hyperactivity disorder, and Tourette Syndrome. Due to these conditions, Michael was labeled as "other health impaired." Michael's parents contended that Cy-Fair did not provide Michael with an 'EP which resulted in an adequate educational benefit to Michael. Due to this alleged deficiency, Michael's parents unilaterally withdrew him from the Cy-Fair district and placed him in PCS at their own expense for approximately four months.

The hearing officer held that Michael received a free appropriate public education ("FAIR") during the 1992-93 school year and that Cy-Fair complied with the procedural requirements under the IDEA during the entire relevant period. Decision of the Hearing Officer, Texas Education Agency Record ("TEA Record") at 36, 44. The hearing officer, however, held that the IEPs developed for Michael on May 26, 1993 and October 4, 1993 were inappropriate because they failed to provide him with any such benefit. Id. at 38, 43. The hearing officer concluded that Michael's placement at PCS was

proper, and that since Cy-Fair had failed to provide Michael with a FAIR, Michael's parents were entitled to reimbursement for the costs in placing him at PCS. Id. at 41, 44-45 Therefore, Cy-Fair was ordered to reimburse Michael's parents $15,978.20 for the PCS placement.

Cy-Fair filed this action as an appeal of the hearing officer's decision. Cy-Fair has challenged, inter alia whether the hearing officer's decision to require reimbursement was correct and claims that this is resolved by determining whether Michael's IEPs developed on October 4, 1993 and November 18, 1993 were reasonably calculated to lead to educational progress for Michael. Michael's parents did not seek additional findings of fact or conclusions of law or appeal any portion of the hearing officer's decision.

Discussion

Using a preponderance of the evidence standard, a district court must conduct a two-pronged inquiry in reviewing an administrative determination under the IDEA: (1) did the district comply with the IDEA procedures; and (2) was the child's IEP "reasonably calculated to enable the child to receive educational benefits." Rowley, 458 U.S. at 206-07. If these requirements are met, the district has complied with the obligations imposed by Congress and the courts can require no more. Id. at 207. Only the second prong is at issue in this case.

In measuring whether a handicapped child would receive educational benefits from an IEP, the reviewing court must examine whether the child has received the

"basic floor of opportunity, or access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child." Id. at 200-01. Although the school district need only provide "some educational benefit," that educational program must be meaningful. Polk v. Central Susqueharma Inter. Unit 16 853 F.2d 171, 181 (3d Cir. 1988), cert. denied, 488 U.S. 1030 (1989). The IEP must offer more than a trivial or de minimis educational benefit, Oberti v. Board of Educ. 995 F.2d 1204, 1213 (3d Cir. 1993), and it must be "likely to produce progress, not regression or trivial educational advancement." Board of Educ. v. Diamond, 808 F.2d 987,991 (3d Cir. 1986) (citing Hall v. Vance County Bd. of Educ. 774 F.2d 629,636 (4th Cir. 1985). Nevertheless, there is no requirement that the school district maximize the educational benefit or potential to any child or spend "equal financial resources on the education of each child." Rowley, 458 U.S. at 200.

No specific substantive education standard is imposed on the state other than "educational instruction specifically designed to permit the child 'to benefit' from instruction." Id. at 188-89,200. The Honorable Judge Steven Hughes recently pointed out that,

> It is important to note at this point in the Rowley opinion, a footnote says the achievement of passing marks and advancement from grade to grade is one important factor in determining educational benefit to a disabled child who is being educated in the regular classroom

> setting. Id. [at 207] n.28. This is the closest the Court comes to explaining "educational benefit." It is implied that other factors are to be considered and that "passing" is just one, albeit important, factor. The Court explicitly stated that they were not attempting "to establish any one test for determining the adequacy of educational benefits conferred upon all children covered by the Act." Id. at 202.

El Paso Indep. Sch. Dist. v. Robert W.. 898 F.Supp 442,447 (W.D. Tex. 1995).

The statute further establishes a preference for "mainstreaming" the handicapped student with nondisabled students in the least restrictive environment[2] consistent with their needs "to the maximum amount possible." 20 U.S.C. § 1412(5); See also Oberti v. Board of Educ. of Clementon Sch. Dist, 995 F.2d 1204 (3d Cir. 1993).

If no suitable or "appropriate" public school is available, the school district must pay the costs of sending the child to an appropriate private school. Jenkins v. Squillacote 935 F.2d 303, 305 (D.C. Cir. 1991), citing School Comm. of Burlington v. Dep't of Educ. 471 U.S. *359,* 369 (1985). See also Alamo Heights Indep. Sch. Dist. v. State Bd. of Educ. 790 F.2d 1153, 1158 (5th Cir. 1986). If there is an appropriate public school program available, i.e. one reasonably calculated to enable the handicapped child to receive educational benefit, the school district need not consider

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[2] "Least restrictive environment" connotes not merely freedom from restraint but freedom to associate with family and with able-bodied peers. Sherri v. Kirby, 975 F.2d 193, 207 n.23 (5th Cir. 1992).

private placement even though private school may be more appropriate or better able to serve the child. In other words, the question of the appropriateness of a public school's program is not determined comparatively. Jenkins, 935 F.2d at 305. If the school district's IEP provides an appropriate program, parents who have chosen to send their child to private school are responsible for the cost of that private placement. 20 U.S.C. § 1401(18,19); Doe v. Defendant I 898 F.2d 1186, 1192 (6th Cir. 1990).

To obtain reimbursement for an alternative placement by parents who unilaterally remove their child from a public school placement, however, the parents must demonstrate that (1) the public school program is inappropriate and (2) the private placement is appropriate. Burlington 471 U.S. at 373-74;[3] Teague 999 F.2d 127, 131-32(5th Cir. 1993). Parents who unilaterally change their child's placement without consent of the state or local school officials, do so at their own financial risk. Florence County Sch. Dist. Four v. Carter. U.S. _ _, 114 S.Ct. 361, 366 (1993) (citing Burlington 471 U.S. at 2004-2005). "They are entitled to reimbursement only if a federal court concludes that the public placement violated IDEA, and that the private school placement was proper under the Act." Florence County 114 S.Ct. at 366 (emphasis in original). If the IEP was appropriate in the local public school district, the district court need not reach the issues of appropriateness of the private school placement and reimbursement. Teague 999 F.2d at

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[3] The Fifth Circuit construes the Burlington rule expansively and allows reimbursement when unilateral placement by a parent does not precisely meet statutory requirements. Alamo Heights Indep. Sch. Dist. v. Dept. of Educ. 790 F.2d 1153, 1161(5th Cir. 1988).

132.

Since the hearing officer concluded that Cy-Fair complied with the procedural requirements of the IDEA and the parties have not challenged this, the Court need only consider tile IEPs in effect during Michael's placement at PCS to determine whether he was receiving a FAPE. Rowley 458 U.S. at 207-08; Hall v. Shawnee Mission Sch. Dist. 856 F.Supp. 1521, 1528(D. Kan. 1994). Thus, the Court's initial focus is whether the IEPs developed for Michael at the time of his placement at PCS were reasonably calculated to enable Michael to receive educational benefits.

Findings of Fact

Based on the administrative record developed before the hearing officer and the evidence presented before this Court, the Court finds that the October 4, 1993 and November 18, 1993 IEPs developed for Michael were reasonably calculated to enable Michael to gain educational benefits. In the evidentiary hearing before this Court, Cy-Fair presented Dr. Christine Salisbury, Ph.D. as an expert with respect to educating disabled children in public schools. Dr. Salisbury has a doctorate degree in special education, with a major in early childhood special education, from the University of Wisconsin-Madison. Dr. Salisbury is currently a Senior Research Scientist and the Director at the Child and Family Studies Program at the Allegheny Singer Research Institute and is a Professor of Psychiatry (Psychology) at the Medical College of Pennsylvania and Hahnemann University in Pittsburgh, Pennsylvania. As her vita Plaintiff's Exhibit 9) and testimony reveal, Dr. Salisbury has immense experience with the various issues presented in this case from academic, practical, and personal standpoints. In observing Dr. Salisbury's testimony in the

evidentiary hearing, the Court finds her testimony to be fully credible, in spite of insinuations made by Michael's counsel, and to be of immense assistance to the Court in this case.

Although the Supreme Court has declined to provide any clearly delineated guideline for determining when a student is achieving "educational benefit," Dr. Salisbury posited that there are four factors which are indications of educational benefit. These four factors are: (1) an individualized program based on the student's assessment and performance; (2) that is administered in the least restrictive environment; (3) the services are provided in a coordinated and collaborative manner by the key stakeholders; and (4) there are demonstrated positive benefits both academically and non-academically. In reviewing the October 4, 1993 IEP and the November 18, 1993 'EP (to the extent possible), with this framework in mind, the Court finds that the IEPs were reasonably calculated to confer educational benefit on Michael.

In order to analyze the appropriateness of the October and November 1993 IEPs, the IEP in place when Michael started attending junior high for the 1993-94 school year needs to be considered. This initial 'EP for the 1993-94 school year was developed at an ARD committee meeting on May 26, 1993 at Michael's previous elementary school. Respondent's Exhibit #9 before the hearing officer is the May 26, 1993 ARD committee report. The Record at 1436. The ARD determined that Michael could be placed in regular education classes at his new junior high for the following school year. The IEP that was developed included support services for the regular education classes, such as a discipline contingency plan, a behavioral intervention plan, psychological services, a tracking teacher to monitor his progress, and a handpicked team of teachers who were to receive training to deal with Michael and his disabilities. Additionally, a

full set of textbooks were to be sent to Michael's home for use during the year and a detailed Discipline Contingency Plan (TEA Record at 1442) was developed for the teachers to utilize in dealing with Michael's behavior. Michael's parents attended this ARD and signed the report and denoted their agreement with the IEP.

The October 4, 1993 IEP. was developed at an AR') which was called in response to difficulties with Michael. By this time, Michael had already received a progress report for the first half of the first six weeks. Michael was passing all but one class and received at least "satisfactory" marks in conduct in all but two of his classes. TEA Record at 1630 (Respondent's Exhibit #52). However, the majority of the teachers indicated that Michael was having a problem turning in completed work. Id.

The October IEP developed by Michael's AR') was individualized in response to Michael's difficulties which were mainly behavioral problems and completing assignments in his mainstream classes. The October IEP required that Michael attend adaptive behavior ("AB")[4] classes, rather than mainstream, for three of his classes. It was also determined that Michael was eligible for content master classes when necessary. Additionally, the discipline contingency plan remained in place with the addition of the option for teachers to send Michael to a discipline management class for the remainder of the class period, as opposed to an emergency removal from class,

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[4] Adaptive Behavior classes are self-contained classes which utilize a point structure which enables the student to gain rewards throughout the class period by exhibiting appropriate behavior.

when his behavior escalated. These modifications were made to the IEP in an effort to accommodate and deal with Michael's behavior problems while continuing to keep him in mainstream classes to the greatest extent possible. This satisfies the first two prongs Dr. Salisbury identified as being indicators of educational benefit.

The ARD was attended by all the key "stakeholders" in Michael's education- his parents, the chairperson of the special education department at Michael's school, a psychologist from the district, the educational diagnostician at Michael's school, a counsel from Michael's school, an assistant principal from Michael's school, and Michael's special education teacher from the adaptive behavior program at his school who also served as his tracking teacher. Michael's parents even signed off on the ARD eport denoting their agreement with the ARD and IEP. TEA Record at 1627. The IEP was developed and approved by a group of professionals in this area of education and Michael's parents. Furthermore, implementation of the IEP required that the ARDcommittee members and the teachers in the school work together in order to accornmodate Michael's behavior problems while educating him. The Court finds that the October IP satisfied the third factor that Dr. Salisbury identified as a sign of educational benefit.

The next factor that needs to be addressed in determining the appropriateness of the October IEP is whether there was any demonstrated positive benefits from the IEP. Michael's parents unilaterally removed Michael from the Cy-Fair district on November 4, 1993, which is only a month after the development of the IEP. Therefore, the full potential effect of the IEP cannot be determined. Michael, however, continued to be able to

attend lunch and pass in the hallways between classes without being escorted by school staff For the first six weeks, Michael received passing grades in all but one class. ThA Record at 1632 (Respondent's Exhibit #54). On October 26, 1993, Michael received his progress report for the first half of the second six weeks. The progress report reflects that he was failing all but one of his classes at the time. TEA Record at 1631 (Respondent's Exhibit #53). However, most of the teachers indicated that the low grade was due to missing grades because assignments were not turned in. By the time Michael was withdrawn from the district, he was passing four of his classes and was very close to receiving passing grades in two additional classes. TEA Record at 1632 (Respondent's Exhibit #54). Michael's passing classes and ability to still proceed through the halls and attend lunch unsupervised are signs of positive benefits from his IEP.[5] Based on the foregoing discussion of the October IEP, the Court finds that the IEP was reasonably calculated to confer educational benefit on Michael.

After Michael's withdrawal from the Cy-Fair district on November 4, 1993, his ARD committee met on November 18,1993, at Michael's parents' request, to review his IEP. The ARD determined that the IEP should be modified slightly, but did not agree with Michael's parents' request to be reimbursed for his placement at PCS because the ARD felt that the district could provide him with a FAPE in a less restrictive environment than

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[5] The Court is cognizant of the increase in disciplinary incidents with Michael during this period. Michael's passing all his classes and not having discipline problems would indicate even greater positive benefits. Yet, the IDEA merely requires some educational benefit, not the maximum.

PCS. The November IEP modified the October IEP by allowing Michael to not suit-up for his physical education class, the implementation of a social behavior curriculum, and offering the services of the Family School Preservation Team to Michael and his family. Those present at the November ARD meeting were essentially the *same* as those at the October ARD meeting with the addition of Michael's attorney and Cy-Fair's attorney. Michael's parents did not agree with the decisions reached at the November ARD meeting. The IEP developed at the ARD, however, was individualized to address the needs of Michael in the least restrictive environment and was developed and was to be implemented in a collaborative manner by the staff at Michael's school. Since the IEP was not actually applied since Michael had already withdrawn from the district, there is no indication of any positive benefits from the IEP. Since three of the indicators of educational benefit are present with respect to the November IEP and the November IEP was similar to the October IEP which did produce positive benefits, the Court finds that the November IEP was reasonably calculated to produce educational benefit for Michael.

Conclusion

In accordance with the foregoing, the Court concludes that the IEPs in effect when Michael was placed at PCS were incompliance with the requirements of the IDEA. Therefore, the hearing officer's determination that the IEPs were inappropriate and Cy-Fair should reimburse Michael's parents for the placement costs at PCS should be reversed.

SIGNED at Houston, Texas, this 12 day of December1995

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CYPRESS-FAIRBANKS INDEPENDENT SCHOOL DISTRICT,

Plaintiff,

vs.

CIVIL ACTION NO. H-94-2944

MICHAEL F. b/n/f MR. AND MRS. BARRY F.,

Defendants.

ORDER

In accordance with the Findings of Fact and Conclusions of Law signed this date, the Court

ORDERS that Cy-Fair's motion for judgment is GRANTED; and

ORDERS that the hearing officer's decision in this case is REVERSED; and

ORDERS that defendants are not entitled to reimbursement from Cy-Fair for Michael's placement costs at PCS; and further

ORDERS that defendants' motion for summary judgment is DEMED; and

ORDERS that Cy-Fair shall recover its cost of court from defendants; and

ORDERS that this case is DISMISSED.

THIS IS FINAL JUDGMENT.

SIGNED at Houston, Texas, this 12 day of December 1995.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CYPRESS-FAIRBANKS INDEPENDENT SCHOOL DISTRICT,

Plaintiff,

vs.

CIVIL ACTION NO. H-94-2944

MICHAEL F. b/n/f MR. AND MRS. BARRY F.,

Defendants.

ORDER

Pending before the Court are defendant Michael F. 's, by next of friend, Mr. and Mrs. F., ("Michael") Motion for a New Trial and/or Motion to Alter or Amend the Judgment (Instrument #69), plaintiff Cypress-Fairbanks Independent School District's ("Cy-Fair") Bill of Costs (Instrument #70), and Michael's Motion to Extend Time for Response to Plaintiffs Bill of Costs (Instrument #72). After considering the record in this case, the submissions of the parties, and the relevant law, the Court concludes that Michael's motion for a new trial and to alter or amend the judgment should be denied, Michael's motion to extend time for response to the bill of costs should be granted, and Cy-Fair's bill of costs should be awarded except for the amount requested pursuant to 28 U.S.C. § 1927.

On December 12, 1995, the Court issued its Finding of Fact and Conclusions of Law (Instrument #67) and Order (Instrument #68) reversing the hearing officer's decision which had required Cy-Fair to reimburse Michael's parents for his unilateral placement at Provo Canyon School in Provo, Utah. Pursuant to Fed. R. Civ. P. 54(d)(1), the Court iiicluded an award of costs to Cy-Fair in its Order. See Instrument #68.

Michael has filed a motion for a new trial pursuant to Fed. R. Civ. P.59. In this motion, Michael first urges the Court to grant a new trial because the decision is against the weight of the evidence. In support of this, Michael mainly reargues the evidence favorable to his side by focusing on numbers (i.e. number of behavioral incidents and class grades). The authority to grant a new trial is confided almost entirely to the exercise of discretion on the part of the trial court. Allied Chem. Corp. v. Daiflon, Inc. 449 U.S. 33, 36(1980). The Court concludes that Michael has not shown that the Court's conclusions were against the weight of the evidence. Rather, it appears that Michael is merely rearguing the same issues already considefed by the Court because he is dissatisfied with the result. Therefore, the motion for a new trial should be denied.

Alternatively, Michael urges the Court to amend the judgment to not award costs to Cy-Fair because the Individuals with Disabilities Education Act ("IDEA") does not provide for an award of costs and to otherwise allow for such an award will have a chilling effect on parents' decisions to bring such suits. Although the IDEA does not provide for the award of costs to a prevailing party, the IDEA does not bar such an award. Federal Rule of Civil Procedure 54(d)(l) provides that "[e]xcept

when express provision therefore is made either in a statute of the United States or in these rules, costs other than attorney's fees shall be allowed *as* of course to the prevailing party unless the court otherwise directs...." Fed. R. Civ. P. 54(d)(1) (emphasis added). Since Cy-Fair was to be awarded costs as a matter of course, the Court finds that the award of costs in the Order of December 12, 1995 (Instrument #68) was proper and Michael's motion to alter or amend the order to delete the award should be denied.

On December 22, 1995, Cy-Fair filed its Bill of Costs (Instrument #70). Cy-Fair has provided documentation with its bill of costs which itemizes $7,960.05 which it contends are recoverable costs under 28 U.S.C. § 1920. In its bill of costs, Cy-Fair has included a request that the Court award it $1,190 from Michael's attorney under 28 U.S.C. § 1927 for expenses it incurred in responding to his vexatious actions.

On January 23, 1995, Michael filed a motion seeking an extension of time in which to file his response to Cy-Fair's bill of costs. Michael's counsel was ill during January 1996 and was unable to timely file a response to the bill of costs. Since Michael's response was filed prior to the Court considering the bill of costs and good cause has been shown, Michael's motion to extend time should be granted.

In response to Cy-Fair's bill of costs, Michael has objected to every item listed by Cy-Fair. Therefore, the Court will proceed to consider the appropriateness of each item of cost sought by Cy-Fair The first item is the recovery of the $120.00 filing fee paid to the Clerk. Section 1920(1) of Title 28 of the United States Code

specifically provides for the recovery of fees of the clerk. Therefore, Cy-Fair is entitled to recover the $120.00 filing fee.

The next item on the bill of costs is $425.80 incurred as fees for serving the summons and complaint on the defendants and for serving summons to Susan Mitchell, Sandra Reed, Deena Baskin, and Carolyn Brady. Although such fees are recoverable under section 1927(1), Michael has objected to the amount as excessive since Cy-Fair used private process servers and served both Michael's parents and Michael's attorney. The expenses of using private process serves is a taxable cost. Alfiex Corp. v. Underwriters Lab. Inc. 914 F.2d 175, 178 (9th Cir. 1990), cert. denied, 502 U.S 812 (1991). Therefore, Cy-Fair is entitled to recover the $425.80 as taxable costs.

The next item on the bill of costs is $1,319.00 as witness fees for six witnesses. This amount is made up of the $40.00 witness fee to each witness ($240.00), $75.00 subsistence fee for Dr. Carol Salisbury who was from Pennsylvania, and $1004 for airfare for Dr. Salisbury to fly round trip between Pittsburgh, Pennsylvania and Houston, Texas. Witness fees are taxable costs under section 1927(3). Michael, however, argues that none of the witnesses were necessary and Cy-Fair could have used the depositions of three of the witnesses at trial rather than call them as live witnesses. Michael also argues that the $1004.00 airfare is unreasonably high because his counsel has called the same airline and determined that the seven day advance airfare from Pittsburgh to Houston is between $289.00 and $385.00. Cy-Fair has provided an affidavit from its attorney wherein she states that Michael's counsel indicated that Michael would not agree to the use of deposition evidence at the hearing before this

Court. Michael has failed to cite any authority for the requirement that airfare is only taxable if the ticket is purchased at least seven days in advance. The Court finds that the witnesses were necessary and the $1,319.00 is recoverable as taxable costs.

The next item on Cy-Fair's bill of costs is $1,247.70 for copies necessarily used in the case under section 1920(4). Michael has objected to the number of copies and the per page cost sought by Cy-Fair Cy-Fair made three copies of all its filings (two for the Court and one for Michael) and one copy of all of Michael's filings. Additionally, Cy-Fair found it necessary to provide copies of the relevant portions of the transcript generated before the hearing officer to two of its witnesses. Cy-Fair made one copy of each of the depositions for its use at trial. This totaled 8,318 copied pages, which Cy-Fair claims cost $1,247.70 at a fair and reasonable amount of $.15 per page. The Court finds that these copies were necessary for Cy-Fair to make in this case and $.I5 per page is a reasonable copy cost. Therefore, Cy-Fair is entitled to recover $1,247.70 as its copy costs under section 1920(4).

The next item contained on Cy-Fair's bill of costs is $3,657.55 for costs incident to taking four depositions. Section 1920(2) allows for tile recovery of costs for stenographic transcriptions necessarily obtained for use in the case. Michael's objection to this item is that the depositions were not necessary in this case. A deposition is taxable as a cost so long as "the taking of the deposition is shown to have been reasonably necessary in the light of facts known to counsel at the time it was taken." Copper Liquor. Inc. v/ Adolph Coors Co.. 684 F.2d 1087, 1099 (5th Cir. 1982). The cost of a deposition may be taxed even if it is used just to structure questioning at trial.

Soderstrum v. Town of Gran Isle, 925 F.2d 135, 141(5th Cir. 1991). Cy-Fair claims that even though Michael refused to allow the use of these depositions at trial, the depositions were necessary to have available at trial for witness examination purposes. The Court finds that the depositions were necessary in this trial and are recoverable as taxable costs.

The final item listed on Cy-Fair's bill of costs is $1,190.00 as attorney's fees against Michael's counsel under 28 U.S.C. § 1927. The decision to award attorney's fees under 28 U.S.C. § 1927 is committed to the Court's discretion. Thomas v. Capital Sec. Servs. Inc. 812 F.2d 984, 990 (5th Cir. 1987). Cy-Fair has argued that Michael's attorney displayed reckless disregard of his duties as an officer of the Court in making frivolous arguments throughout discovery in this case and by continued assertion of a counter-claim for attorney's fees. Section 1927 is to be strictly construed, and sanctions are not appropriate unless the attorney is shown to have acted in bad faith, with improper motive, or with a reckless disregard of the duty owed to the Court. Baulch v. Johns 70 F.3d 813, 817 (5th Cir. 1995). The Court concludes that Michael's counsel's actions were not so reckless as to warrant sanctions in this case. Cy-Fair's request for attorney's fees under 28 U.S.C. § 1927 should be denied.

In accordance with the foregoing, the Court

ORDERS that Michael's motion for a new trial and/or motion to alteror amend the judgment is DENIED; and

ORDERS that Michael's motion to extend time for response to Cy-Fair's bill of costs is GRANTED; and

ORDERS that Cy-Fair shall recover $6,770.05 from Michael as its costs of court.

All other relief not granted herein is denied.

SIGNED at Houston, Texas, this day of February 1996.

DOCKET NO. O7O-SE-1193

MICHAEL F., BNF, MR. & MRS. BARRY F., PETITIONER	BEFORE A SPECIAL EDUCATION
V.	HEARING OFFICER
CYPRESS-FAIRBANKS INDEPENDENT SCHOOL DISTRICT, RESPONDENT	FOR THE STATE OF TEXAS

DECISION OF THE HEARING OFFICER

Statement of the Case

Petitioner, Michael F. by his next friends and parents, Mr. and Mrs. Barry F., brought this action under the Individua1s with Disabilities Education Act (hereafter "IDEA"), 20 U.S.C. §1400 et seq., seeking reimbursement for the costs incurred during the unilateral placement of Petitioner at an out-of-state residential treatment facility. Petitioner also seeks a determination as to whether Petitioner's individual education plan and placement for the 1992-93 and 1993-94 school years were appropriate and whether Petitioner had been denied access to the ARD Committee process.

Eleven days of hearing were held in this matter between April 5, 1994 and April 27, 1994.

Based upon the evidence presented at the hearing, this Hearing Officer makes the following findings of fact and conclusions of law:

Findings Of Facts

1. Michael F. is a thirteen (13) year old male who suffer from Tourettes Syndrome, Attention

DeficitHyperactivity disorder, and Obsessive Compulsive Disorder. He resides with his parents within the jurisdictional boundaries of Cypress-Fairbanks. Independent School District. [T. 410].

2. Cypress-Fairbanks Independent School District is a political subdivision of the State of Texas and a duly incorporated independent school district located in Harris County, Texas. Cypress-Fairbanks Independent School District is the 1ocal educational agency responsible under the IDEA for providing Michael with a "free appropriate public education"

3. Michael was identified as a child with an "Attention Deficit Hyperactivity Disorder" (ADHA) at an early age due to his impulsive and aggressive behavior. [T. 412]. In the first grade he began taking Ritalin for his ADHA which was later switched to TrofaniI. [R. Exh. #71].

4. In the fourth grade, Michael's symptoms worsened and his parents sought treatment for Michael from a psychiatrist. They also began receiving psychotherapy services from Gina Novellino, a psychologist. [T. 412].

5. In the fifth grade, while attending Klein Independent School District, Michael displayed great difficulty working with others, had difficulty staying focused, displayed a lack of se1f-confidence, and became upset by new situations. He also began developing academic problems. As a result, Michael was referred for special education. [R. Exh. #71].

6. A comprehensive educational evaluation of Michael was completed by Klein Independent School District on May 18, 1992. The evaluation indicated thatMichael was of average inte1ligence, had received adequate grades until that previous semester, and that his conduct grades were poor.

It further recommended that Michael qualify for special education services as an "other health impaired" student due to his Attention Deficit Hyperactivity Disorder and problems with organizational skills. [R. Exh. #71]. At that time, Michael had not been identified as having Tourettes Syndrome or , an Obsessive Compulsive Disorder.

7. On June 3, 1992, Klein Independent School District convened an initial ARD Committee to determine Michael's eligibility for special education services. The ARD Committee determined that Michael met the eligibility criteria for special education services as an "other health impaired" student. The ARD Committee also developed an Individual Education Plan (IEP) for Michael for the 1992-93 school year (sixth grade) that included placement in regular education classes with modifications and a helping teacher. [R. Exh. #72].

8. During the summer of 1992, Michael and his family moved within the jurisdictional boundaries of Cypress-Fairbanks Independent School District.

9. On August 2l, 1992, Cypress-Fairbanks Independent School District convened a transfer ARD Committee to admit Michael into its educational program. The ARD Committee developed an interim 30-day IEP for Michael similar to that proposed by Klein Independent School District. Michael was placed in regular education classes with modifications and provided with access to a content master class. [R. Exh. #1]. A behavioral IEP was discussed by the ARD Committee but the Committee decided to wait until the next ARD Committee meeting to determine whether Michael required such an IEP. During the intervening 30 days, Michael's teachers ere to monitor his behavior closely. [R. Exh. #1].

10. Michael's parents signed the ARD

Committee documents indicating their approval of the ARD Committee decision. [R. Exh. #1].

11. The 30-day ARD Committee was convened on October 5, 1993. The ARD Committee reviewed Michael's educational programming and placement anddetermined that they were appropriate. The ARD Committee also addressed Michael's classroom behavior. Michael's teachers reported that Michael lacked self-confidence, possessed impulsive behavior and occasionally needed "time out". The ARD Committee developed a behavioral plan for Michael for his teachers and administrators to follow when behavior became a concern or interfered in the classroom.

Michael's behavior plan included: (I) Michael being allowed to move his desk away from the group or go to a "time out" cooling off area when displaying disruptive behavior; (2) that when directions were given to address behavior, to limit the amount of confrontation; (3) when behavior cannot be controlled using the other approaches, that Michael be sent to the counselor for a cooling off period; (4) that if severe infractions occur, that Michael be immediately sent to the assistant principal's office for conference with the assistant principal and counselor and that they allow time for cooling off to reason with consequences; (5) that a discipline management class (DMC) be administered on an as needed basis for classroom infractions as opposed to an all day DMC assignment (specifically to address ADV advisory and those classes where behaviors occurred on a more frequent basis); and (6) that school officials maintain close contact with Michael's parents. [R. Exh. #2].

12. The ARD Committee agreed to maintain Michael in his regular education classes but included an IEP goal to "develop responsibility and problem solving

to promote academic learning and social skills." [R. Exh. #2]

13. Michael's misbehavior on the regular education bus was also discussed but the ARD Committee did not have available any bus reports of misconduct. Michael's' medication timing was also discussed and changes were approved as a means of improving Michael's behavior in the afternoon and on the bus. [R. Exh. #21.

14. Michael's misbehavior during the fall semester of 1992-93 school year that resulted in written disciplinary notices were significant.

15. On September 25, 1992, Michael, on two occasions engaged in loud hollering in class and was involved in an inappropriate action toward a girl. As a resultof this misconduct, Michael received 2 days of detention hall. [P. Exh. 47].

16. On October 1,1992, Michael received a transportation misconduct report and warning for dropping other students flashcards down the stairwell of the bus, for grabbing student's backpacks and not letting go, for telling other boys that he is "gay", that he loves them and how cute they 1ook. IP. Exh. #541.

17. On October 5. 1992, Michael received a transportation misconduct report and warning for not staying seated on the bus, for calling another student "gay", for stating he is "gay " and 1ikes to be the girl, that he is going to marry another boy for recalling when he was a sperm in graphic detail, for being very sexually exp1icit and yelling sexual comments all the way home. [P. Exh. #53].

18. On October 6, 1992, Michael received a third transportation misconduct report that resulted in a 3-day suspension from the bus. [P. Exh. #52 and 71].

19. On November 18, 1992, Michael was involved with a scuffle with another student wherein Michael admitted that when playful contact between he and the other student escalated, Michael hit the student in "his darling cheek". [P. Exh. #50]. Michael received 3 days of detention for this misconduct. [P. Exh. #47 and 53].

20. On November 23, 1992, Michael received a transportation misconduct report and warning for unidentified misconduct on the bus. [P. Exh. #71].

21. On December 2, 1992, Michael talked back to his teacher, talked about others, interrupted others, licked books and paper and bothered another student by rubbing that student's leg. [P. Exh. #49]. A written discipline notice of this misconduct was prepared. [P. Exh. #49].

22. On December 3, 1992, Michael was involved in a fight with another student. Michael received 3 days of DMC for this misconduct. [P. Exh. # 47 and 48].

23. The use of DMC for 3 days was an appropriate response to the seriousness of the misconduct and did not violate Michael's behavior management plan. Michael's behavior management plan limited the amount of DMC only for classroom infractions and not for seriousinfractions. [R. Exh. #2].

24. In January, 1993, Michael was diagnosed by his attending psychiatrist, Dr. Rosenburg, with Tourettes Syndrome. [R. Exh. #86, page 10].

25. Tourettes Syndrome is a neurologic movement disorder that usually appears in childhood. Symptoms include motor tics of the face such as eye-blinking, nose twitching or facial grimace, and tics of the neck, truck and limbs. Tics may also involve the entire body, such as kicking, stamping, etc. Other

symptoms include touching, or repetitive or compulsive thoughts or movements. Additionally, symptoms may include verbal tics such as grunting, throat clearing, shouting, barking, or humming, and/or an echo phenomena which may include repeating words of others, ones own words, or repeating the movements of others.

A small percentage of patients have coprolalia, the saying of obscene and vulgar words ore phrases involuntarily.

Anxiety, emotional stress, tension or fatigue cause an increase of symptoms. Concentration or a non-anxious task often results in a decrease of symptoms.

Other abnormal movements or behavioral patterns may also occur. Some include stuttering, sticking out the tongue, pounding the chest, stomach or head with the hand or fist, grinding the teeth, handling the genitals, abnormal walking, temper tantrums, echopraxia (imitating the movements of others), and compulsive touching.

The cause of Tourettes Syndrome is unknown but the cause is organic rather than psychological and researchers feel it may be due to a biochemical imbalance in the central nervous system and may involve an are a of the brain called the basal ganglia.

All suffers of Tourettes develop the ability to inhibit symptoms for some period of time, from a few moments to several hours. However, this inhibiting stores rather than eliminates symptoms and there must ultimately be a release. The severity of the symptoms wax and wane (increase and decrease). Puberty tends to maximize the symptoms.

Medications an be effective in reducing the frequency of tics but are not a cure. Medication can reducesymptoms but when discontinued, symptoms return.

Psychotherapy can help sufferers of Tourettes and their families cope with the disorder but it does not reduce or eliminate symptoms. [R. Exh. #77].

26. Michaels suffers from a severe form of Tourettes that include coprolalia. He also displays physical aggression, which is usually described as an associated symptom. [T. 3084].

27. Beginning in early January, 1993, Michael's medications were changed by his attending psychiatrist. During the next two months, Michael's Ritalin and Tofranil were discontinued; he began taking Lithium, Anafranil and Haldol; he began taking Prolixin; his Haldol and Anafranil were discontinued and was restarted on Ritalin. [R. Exh. #86]. These medication trials were attempts to reduce the severity of Michael's Tourettes symptoms. [R. Exh. #86].

28. During the second semester of Michael's sixth grade year, his behavior became significantly worse. [R. Exh. #26; P. Exh. #47].

29. On January 12, 1993, Michael used offensive language to friends in the library for which he received detention hall. He also became involved in a fight with another student for which he received 3 days of DMC. [R. Exh. #26; P. Exh. #47].

30. On January 14, 1993, Michael disrupted DMC by talking and making sexual remarks such as "be careful in the boys bathroom-the toilet monster will bite it off and you will only have stubs," "King Kong plays ping pong with his ding dong," and "Don't be silly, put a rubber on your willy." [P. Exh. #26].

31. On January 25, 1993, Michael spit on another student at lunch because he "wanted to". For this misconduct, he received 2 days of detention hall. [R. Exh. #26; P. Exh. #38 and 47]. Additionally, he disrupted

his fifth and sixth grade period classes by talking back to his teacher, disrupting others, and refusing to sit in isolation. [P. Exh. # 34 and 37].

Michael also received a bus misconduct report for being extremely loud, making insulting remarks to girls around him and for getting off the bus, bending over,grabbing each side of his buttock, turning his head toward the bus and sticking his tongue out. For this misconduct, Michael was suspended from the bus for three days. [P. Exh. #40 and 71].

32. On January 26, 1993, Michael was involved in a hallway infraction before school and later disrupted his classroom. For this misconduct, he was written up and conferenced. Michael also misbehaved in the computer room. He was removed from class and sat in the assistant principal's office for the remainder of the day. [R. Exh. #26; P. Exh. #47].

33. On January 27, 1993, Michael was Kung Fu kicking repeatedly for which he was sent to the assistant principal's office for the remainder of the day. [R. Exh. #26; P. Exh. #37].

34. On January 29, 1993, Michael hit another student for which he received 3 days of lunch detention hall. [R. Exh. #26; P. Exh. #33]. He also disrupted his fifth period class by repeatedly getting out of his chair and walking across the room. [P. Exh. #22].

35. On February 1, 1993, Michael was involved in passing gas and repeated disruption of his class. His parent was notified and Michael was emergency removed for the remainder of the day. [R. Exh. #26; P. Exh. #34 and 47].

36. On February 2, 1993, Michael was involved in more classroom disruption resulting in him being sent to the assistant principal's office for the remainder of the day. [R. Exh. #26; P. Exh. #47].

37. On February 3, 1993, Michael disrupted his fifth period class by being continually off task, mumbling and not participating during reading. [P. Exh. #32].

38. On February 4, 1993, and ARD Committee meeting was convened to address the increasing level and frequency of Michael's behavioral problems. The ARD Committee found that Michael's misconduct was interfering with his academic success. The ARD Committee was made aware of the medication assessment and changes that were occurring and how such changes may affect Michael's behavior. The ARD Committee also discussedMichael's bus misbehavior and determined that the safety of Michael and other students was a concern. The ARD Committee agreed that Michael could continue to ride on the regular school bus but indicated that if he received any further bus reports, he would be removed from regular transportation. The ARD Committee also discussed and addressed Michael's misbehavior and disruptions in P.E.

The ARD Committee determined that Michael's behavior plan would remain in effect but that the content mastery class could be used to supplement his instruction when Michael's behavior inferred with his ability to focus and complete his work in the regular classroom. This was to be used as an alternative to direct removal from instruction. [R. Exh. #3].

39. On February 8, 1993, Michael refused to report to the content mastery class. For this misbehavior, he was conferenced and his parents were called. [R. Exh. #26; P. Exh. # 32].

40. On February 12, 1993, another ARD Committee meeting was convened to further address Michael's behavioral problems. The ARD Committee found that Michael's behavioral problems showed a need for consistent behavioral structure throughout the

instructional day. Consequently, the ARD Committee changed Michael's educational placement from regular education classes to its self-contained, adaptive behavior classroom for English/Language Arts, Math and Social Studies. Michael remained in his regular education science class and P.E. The ARD Committee also provided Michael with a social behavior curriculum in his adaptive behavior class, with psychological services of one hour per month from the school psychologist, and with a discipline contingency plan for use when verbal aggression occurred.

The adaptive behavior class had its own adaptive behavior program designed to provide impulse control, a level/point system and achieving levels of recognition. [R. Exh. #4].

At this ARD Committee meeting, Michael's mother stated that she would begin providing transportation for Michael to and from school. [R. Exh. #4].

41. On February 15, 1993, while Michaelwas in his adaptive behavior math class, he refused to get on task stating he "didn't want to do this fucking, sucking work". Michael then became physically violent, kicked a file cabinet, desk, wall, and door, threw a chair and attempted to break a fire extinguisher. Michael was emergency removed from school for the remainder of the day. [P. Exh. #16].

42. On February 16, 1993, Michael was disrespectful to a teacher and fought with another student after school. He received 3 days of DMC for this misconduct.

43. On February 17, 1993, while in DMC, Michael received 12 warnings for talking without permission and making crude, obscene and sexual comments, such as showing a crude picture to another

student and saying, "give this picture to your mother as a thank you card - she was good"; and "giving blow jobs on anyone who wants it"; and "don't be sill, put a rubber on you willy". [P. Exh. #95].

Later, Michael became involved with another student in a fight, hit two students, and kicked a teacher three times while the teacher was trying to break it up. Michael received 3 days of DMC for this misconduct. Later that day, Michael went berzerk in DMC, hit an assistant principal in the stomach, kicked two girls and threw an assistant principal's nameplate. Michael was emergency removed for 5 days for this misconduct. Both the teacher and the assistant principal were injured during these incidents. [R. Exh. #26; P. Exhs. #18, 22, 23, 71, 85 and 94].

44. An ARD Committee was convened on February 23, 1993, to discuss Michael's aggressive and abusive behavior, his emergency removal and possible expulsion from school for aggression against a school administrator. The ARD Committee received written notification from Michael's psychologist indication that his misbehaviors were directly related to his disability. The ARD Committee also received a Physicians Report of Eligibility from Michael's psychiatrist indicating that Michael had been diagnosed with Tourettes Disorder; that it was sever; that the severity of his symptoms could be expected to fluctuate; and that he qualified for special education as "other health impaired" because of his Tourettes Disorder. This eligibility report also recommended homebound placement for Michael for an undetermined time. The ARD Committee determined that Michael's misbehavior was directly related to his diagnosis of Tourettes, and that expulsion was not an option.

The ARD Committee agreed with the

homebound placement recommendation and agreed to explore other programming placement options during the period of homebound placement. The ARD Committee also found the discipline contingency plan to be inappropriate and that it needed to be addressed when Michael returned to an in-district placement. Psychological services were also offered during the period of the homebound instruction but Michael's parent declined, stating that they would continue using Michael's private therapist. The ARD Committee determined that Michael would receive 4 hours of homebound services per week. [R. Exh. #5].

45. The understanding of most ARD Committee members was that homebound services were being recommended of purposes of medication trials and medical stabilization. [T. 830, 1275].

46. During the period of homebound services, staff from Cypress-Fairbanks Independent School District reviewed alternative programs and placements which served children with Tourettes. Subsequently, a meeting was held wherein the staff found that the behavior management approaches utilized in the adaptive behavior classroom were consisted with those utilized elsewhere and were appropriate for addressing Michael's misbehavior.

47. On April 2, 1993, an ARD Committee was convened to return Michael from homebound services and place him back into the adaptive behavior program. Revisions were made in Michael's behavior management plan. Goals were identified that included increasing on task behavior and extinguishing verbal and physical aggression. [R. Exh. #7]. Michael's placement in a regular science class was changed to a resource science class. Psychological services were increased to 30 minutes per week. The ARD Committee

also provided a one-to-one classroom aide for Michael to assist in implementing his behavior plan and provide support with programming. [R. Exh. #6].

48. Academically, Michael performedwell in the homebound program receiving a grade of 93 in Math, 91 in Science, 95 in Would Cultures, 90 in Language Arts and a 94 in Reading. [P. Exh. #7].

49. At the April 2, 1993, ARD committee meeting, Michael's parents agreed to continue to provide transportation for Michael to and from school in lieu of receiving special transportation services. [R. Exh. #6].

50. On April 13, 1993, Michael left school without permission and called his father. He also attempted to grab his aide's private parts. For this misconduct, Michael was emergency removed from school for the remainder of the day. [R. Exh. #26].

51. On April 15, 1993, Michael tried)or pretended) to hit his P.E. coach. When the coach grabbed and held Michael, he use vulgar language and cursed at the coach. this occurred in front of the coach's class. For this misconduct, Michael was written up, was conferenced with, refocused and returned to class. [R. Exh. #26 and 74].

52. On April 16, 1993, Michael stole some liquid paper from his teachers desk and began sniffing it. He then refused to cooperate with his aide and acted like he was going to hit him. Michael was emergency removed for the remainder of the day for this misconduct. [R. Exh. #26; P. Exh. #86 and 87].

53. On April 23, 1993, an ARD Committee meeting was convened to review Michael's programming and placement. Michael's adaptive behavior teacher reported that Michael was responding to the behavioral and academic program in her class and

that he had shown that he could work within the adaptive behavior classroom without the need of the aide. Consequently, the ARD Committee agreed to remove the one-to-one aide for Michael and to maintain him in the adaptive behavior program. [R. Exh. #8].

54. On April 29, 1993, Michael pushed the assistant principal and was disrespectful to the principal. For this misconduct, Michael was emergency removed for the remainder of the day and the next school day. [R. Exh. #26].

55. On May 4, 1993, Michael was asked to leave class for inappropriate comments. He refused tocooperate resulting in him being written up, conferenced and his father being called. [R. Exh. #26].

56. On May 6, 1993, Michael got upset with another student and pushed him. This misconduct resulted in Michael being conferenced, being sent to the office to cool off and then being returned to class. [R. Exh. #26].

57. On May 7, 1993, Michael refused to cooperate with his teacher after being given an opportunity to refocus. This misconduct resulted in Michael being conferenced and his father being called. [r. Exh. #26].

58. On May 12, 1993, Michael grabbed another student's leg in a sexual way. He was emergency removed for this misconduct for the remainder of the day. [R. Exh. #26; P. Exh. #88 and 89].

59. On May 14, 1993, Michael grabbed another student at P.E., pulled him off the court, put his mouth on the neck of another student, and would not refocus. Michael was emergency removed for the remainder of the school day. [r. Exh. #84 and 90].

60. On May 20, 1993, Michael improperly touched another student for which he

received a conference and warning. [R. Exh. #26].

61. On May 25, 1993, Michael attempted to pull another male student's pants down. for this misconduct, Michael was prohibited from attending his P.E. Class that day. [R. Exh. #26; P. Exh. #91].

62. Also on May 25, 1993, Michael announced to the class that he was going to kill his mother. He also walked up to another student and raised his fist to him. He was warned by his teacher not to touch others but refused to comply. He was very disruptive in class yelling "whoopti doo" at the top of his voice, he disturbed other classes and when asked to sop, he told the teacher to "shut up" and not "tell him what to do.". [P. Exh. #92].

63. On May 25, 1993, Michael also went up to another student and spat in a student's face and hit the student. [T. 2600-2604]. When his teacher attempted to redirect him, he called her a "fucking nigger". [T. 2600; R. Exh. #26]. As a result of the misconduct, Michael was emergency removed for the remainder of that school day antthe last two days of school. [R. Exh. #26].

64. An ARD Committee was convened on May 26, 1993, to review Michael's educational progress, plan for his educational programming and placement for the 1993-94 school year and to review his misconduct resulting in his emergency removal. The ARD Committee reviewed Michael's current IEP. Michael failed to achieve master of any goals and objectives contained in his IEP except for three objectives in the area of general science. [R. Exh. #27]. The ARD committee found that progress had been made on all other listed goals and objections but that mastery had not been achieved. [R. Exh. #27]. The ARD Committee also reviewed Michael's grades. He received passing grades in all of his subjects. [R. Exh. #25]. Behaviorally, Michael's

adaptive behavior teacher noted that Michael was able to refocus after behavioral incidences. The ARD Committee determined that Michael could be place into the regular education program at his local Junior High School for the 1993-94 school year. Michael's placement in the regular education program was recommended by his parents due to their concern that Michael not be continued in the adaptive behavior program because he would be around other children with emotional and behavioral problems. The ARD Committee concurred with their recommendation, believing that a new school, new environment and the intervening summer recess wherein medication trials and stabilization could occur might benefit Michael and improve his behavior. The ARD Committee provided support services for Michael's regular education plan that included a discipline contingency plan, a behavioral intervention plan, IEP's for psychological services and counseling, a tracking teacher, classroom modifications, and a hand-picked instructional team. [R. Exh. #9; P. Exh. 10a]>

65. In July, 1993, Michael's behavior at home deteriorated to the point that Michael's parents considered hospitalizing him. Michael's psychologist was also of the opinion that Michael's behavior at home and at her office was inappropriate (i.e., sitting in her office and passing gas, falling over onto his mother, blurting out answers). She also believed that Michael needed the type of highly structured environment during the summer that could be provided in aresidential treatment center. [R. Exh. #85, page 211].

66. Michael was not hospitalized or placed in a residential treatment facility during the summer of 1993.

67. In August, 1993, Michael began seventh grade in regular education classes at his local

junior high school.

68. On September 2, 1993, Michael was off task and used obscenities towards another student resulting in a disciplinary notice. [P. Exh. #115].

69. On September 7, 1993, Michael was roughhousing with another student in his Advisory class for which he received a discipline notice, was conferenced and give a "time-out". [P. Exh. #115].

70. On September 13, 1993, Michael engaged in a screaming match in the hall with a substitute teacher. Another teacher intervened and allowed Michael to remain in her room for the remainder of the period. [P. Exh. #100]. He also continually interrupted his third period class resulting in a discipline notice. [P. Exh. #115].

71 On September 151993, Michael disrupted his second period class by calling another student a "slut: and cussing and then refusing to go to the time-out. He also used profanity toward the Assistant Principal. For this misconduct he received isolation in the Assistant Principal's office for 30 minutes. [P. Exh. #100' R. Exh. #61]. He again disrupted his third period class for which he was conferenced and give a "time-out" in the classroom. [R. Exh. #61].

72. On September 17, 1993, Michael disrupted his second period class by talking out, making rude comments to his teacher i.e. "Cy-Fair sucks as a district if they hired you fat lady", by insulting other students and by throwing a wad of paper at his teacher. For this misconduct, Michael received 30 minutes of isolation in the assistant principal's office. [R. Exh. #61].

At lunch, Michael took a bite out of another boy's pizza without permission. for this misconduct, he was removed from lunch and received another 30 minutes of isolation in the assistant principal's office. [r. Exh.

#61].

Michael also disrupted his third period class by usingprofanity, refusing to comply, making "farting" noises, and deliberately "farting" in time-out. for this misconduct Michael was emergency removed for 1/2 day from school. [R. Exh. #61].

73. On September 20, 1993, Michael got into a fight with another student on the bus. For this misconduct, he received a 3-day suspension from using the bus. [R. Exh. #61].

74. On September 24, 1993, Michael disrupted his sixth period class. Time-out was given but was ineffective and Michael was removed to the Assistant Principal's office where he was uncooperative and refused to stay where he was assigned to sit. Michael's father was contacted and told that Michael was going to be emergency removed. Michael's father requested that they keep Michael at school. Michael then agreed to behave in his remaining classes and therefore, he was returned to class. However, during eighth period P.E., Michael refused to suit up, disrupted the class and argued with the coaches. Michael was then emergency removed for the remainder of the day. [r. Exh. #61].

76. On September 27, 1993, Michael disrupted his second period class by being rude, cussing and intolerable. His teacher indicated that Michael's behavior modification plan did not seem to be working in her class because Michael would refuse to go to "time-out" and then would become uncontrollable. She further indicated that he "cussed" every class period and refused to be quiet when asked to do so. [P. Exh. #100].

77. On September 28, 1993, Michael disrupted his third period and advisory classes resulting in a conference with his teacher and time-out in the classroom. [R. Exh. #61].

78. On September 29, 1993, Michael refused to work in second period and was disruptive in study hall and in an after-school dentition hall. For this misconduct, another detention hall was scheduled. [R. Exh. #61; P. Exh. #100].

79. On September 30, 1993, Michael refused to take his medicine and therefore had to be escorted by the Assistant Principal to the Nurse to take his medicine. [R. Exh. #61].

80. On October 1, 1993, Michael disrupted his second period class by yelling out, calling is teacher a "ferret" and throwing a stretched out paper clip and pencil at his teacher. He was also insubordinate with the assistant principal. for this misconduct, Michael was emergency removed from school for 1/2 day. [R. Exh. #61].

81. On October 4, 1993, Michael refused to comply with instructions and left his eighth period P.E. class without permission. As a result, Michael spent the remainder of the period in isolation in the Assistant Principal's office. [R. Exh. #36].

Later, Michael was also disruptive and removed from detention hall to the Assistant Principal's office. Then, he began "farting". His father was contacted and came and picked up Michael. His detention hall was rescheduled for another day. [R. Exh. #61].

82. On October 4, 1993, an ARD Committee was convened to review Michael's educational programming and behavior. The ARD Committee found Michael's behavioral problems to be more severe in some classes than in others. The ARD Committee determined that beginning on October 7, 1993, Michael would be placed into the adaptive behavior program for his classes in math, language arts, and Texas history, and would

remain in regular classes for science, reading, industrial technology, speech and P.E. A content mastery class was also added as on option for Michael. [R. Exh. #50].

83. On October 5, 1993, Michael began yelling in class, crumpled pages in his book and called his teacher a "fat cow". He then called a female student a "slut". When the female student told him to have some respect, he threw a book at her. She then shoved Michael and she and Michael became involved in a fight. Michael had his knee on her chest and was pulling out her hair when the fight was broken up. The girl was sent to the nurse and Michael to the Assistant Principal's office. for this misconduct Michael was emergency removed for the remainder of the school day and the next school day. [R. Exh. # 61; P. Exh. #100].

84. Michael's parents perceived this fightand injury to the female student as a serious indecent and an escalation of Michael's behavior. Although they had looked at residential placements for Michael beginning in February, 1993, they felt this incident and his escalating behavior warranted further consideration of alternative placements including residential placement. [T. 416, 453, 464-470]. Michael's parents began looking for alternative placements for Michael including placement in the Alternative Behavior Center operated by Cypress-Fairbanks Independent School District. Michael's parents reviewed this placement but felt it was inappropriate for meeting Michael's needs. [T. 471-476]. They then proceeded to review alternative schools including residential placements. [T. 477-479].

85. On October 7, 1993, Michael began his partial placement in the adaptive behavior program. However, he disrupted his regular fourth period class and was disrespectful to his teacher. for this misconduct, he received a "time-out" with his teacher. [R. Exh. #61].

86. On October 8, 1993, Michael disrupted his eighth period class and cussed at teachers and staff. He was removed to the Assistant Principal's office and received DMC for the remainder of the period. [R. Exh. #61].

87. On October 11, 1993, Michael disrupted his fourth period class. He was removed to the Assistant Principal's office and placed in isolation. [R. Exh. #61].

88. On October 12, 1993, Michael refused to take his medicine and called the nurse a "fucking bitch". for this misconduct, he was emergency removed from school for 1/2 day. Michael did later apologize to the nurse. [R. Exh. #61; P. Exh. #100].

89. On October 18, 1993, Michael refused to suit up for P.E. and therefore spent the remainder of the period in isolation in the Assistant Principal's office. [R. Exh. #61].

90. On October 18, 1993, Michael received a bus report and a warning letter for misconduct. [R. Exh. #61].

91. On October 22, 1993, Michael refused to take his medicine and had to be escorted to the nurse by theAssistant Principal. [r. Exh. #61].

92. On October 25, 1993, Michael made threats and used profanity towards another student while in the adaptive behavior class. for this misconduct he was conferenced, received three warning, and three time-outs. During his eighth period P.E. class, Michael began wrestling with another student for which he received isolation in the Assistant Principal's office. [R. Exh. #61].

93. On October 26, 1993, Michael disrupted his third period adaptive behavior class. This disruption resulted in his removal from class. [R. Exh. #61].

94. On October 27, 1993, Michael disrupted his advisory class for which he received a conference. [R. Exh. #61].

95. On October 29, 1993, Michael disrupted his sixth period science class by using profanity to students. He was removed from class after time-out was unsuccessful and was isolated in the Assistant Principal's office for one hour. [R. Exh. 361].

96. On November 1, 1993, Michael was disruptive in his third period adaptive behavior class and was disrespectful to his teacher. For this misconduct he was conferenced and received warning and time-outs by his teacher. [R. Exh. #61].

97. On November 2, 1993, Michael was disrespectful to his fifth period teacher and refused to comply with instructions. For this misconduct he spent the remainder of the fifth period in DMC, received a Saturday detention hall, and was conferenced with by the Assistant Principal. Additionally, Michael's father called him to talk about his behavior. [r. Exh. #61].

Michael was also disruptive in his sixth period science class. He used profanity to students and hiss teacher. He was removed from class by the Assistant Principal after time-out was unsuccessful. He spent the reminder of the period in the Assistant Principal's office in isolation.

During his eighth period class, Michael refused to comply with his teacher's requests and left class without permission (said he was going to get a coke). [R. Exh. #61].

98. On November 3, 1993, Michael was disrespectful in his third period adaptive behavior class, he left class without permission and called his teacher a "bitch". for this misconduct, Michael was conferenced with and received isolation in the Assistant Principal's

office. [R. Exh. #61].

99. On November 4, 1993, Michael yelled "shit" in the hallway before his sixth period class for which he was conferenced with about appropriate behavior in the hall and sent back to class. [R. Exh. #61].

100. After November 4. 1993. Michael did not attend school in Cypress-Fairbanks Independent School District. [R. Exh. #47].

101. At the request of Michael's parents, an ARD Committee was convened on November 18, 1993, to request that the school district approve Michael's educational placement at the Provo Canyon School, a residential treatment facility located in Provo, Utah, and to request reimbursement for the costs of this residential placement. the ARD Committee determined that Michael's in-district educational program was reasonably calculated to confer upon him an educational benefit and was the least restrictive environment in which to do so. The ARD Committee made modifications to Michael's educational program, including placing Michael in a social behavior class and removing Michael from hi speech class. The ARD Committee also eliminated the requirement that Michel dress in gym clothes for P.E. Michael's parents disagreed with the decisions rendered by the ARD Committee. [R. Exh. #65].

102. By letter dated November 18, 1993, Michael parents requested a special education due process hearing from the Commissioner of Education.

103. Michael was admitted to Provo Canyon School on November 8, 1993.

104. Provo Canyon School is a 24-hour residential treatment center approved by the Utah State Board of Education, the California State Board of Education, the Wyoming State Board of Education and the Joint Commission for Accreditation of Hospitals. [T.

280, 297, 302, and 341].

105. The cost of Michael's room and care at Provo Canyon School from November 8, 1993 throughFebruary 12, 1994, was $15, 978.20 [P. Exh. #55].

106. The residential placement costs of Michael are reasonable and appropriate in relation to the costs of other residential placements. [T. 478-479].

107. Other costs associated with Michael's residential placement were not adequately identified in the record of this proceeding. [T. 420-421]. The statement of costs attached to Petitioner's Post-hearing Brief is not a part of the official record of this proceeding and therefore cannot be considered as evidence.

108. While at Provo Canyon Scho[illegible], Michael was enrolled in a grade level academic curriculum and received passing grades in all of his subjects. [P. Exh. # 56].

109. Michael's individualized treatment program at Provo Canyon School was designed to address Michael's depression and mood swings; to improve his self-esteem and social interactions; to address his anger and his ability to deal with his emotions; to increase his ability to comply with authority; to gain better control over his impulses and decrease his attention deficit hyperactivity symptoms; to decrease his manipulative behaviors; to understand his Tourettes and learn to control his Tourettes where possible; to be responsible for his behavior; to improve communication patterns with his family; and to become more independent. [R. Exh. 387; Dep. Exh. #3].

110. While at Provo Canyon School, Michael participated in a structured academic program, structured milieu setting, individual and group therapy sessions and family therapy. Michael was successful in

this program and showed major improvement in his self-esteem and his ability to get along with peers. Michael showed significant improvement in the academic area and was able to control his impulses to the point of it not interfering with his academics. [R. Exh. #87; Dep. Exh. #10].

111. Michael was discharge from Provo Canyon School on February 11, 1994, because his parents could no longer afford this residential placement. [T. 417-419].

112. Despite Michael showing significant improvement while in the structured environment of the residential placement, Michael was discharged against clinicaladvice because it was questionable as to how much of these changes and skills had been given time to become internalized rather than being externally controlled through the structure of the program. [R. Exh. #87; Dep. Exh. #10].

113. Upon returning home from Provo Canyon School, Michael was enrolled by his parents in a private christian school located in Houston, Texas. As of April 6, 1994, Michael was performing well in the regular education classes at this school, receiving passing grades in all of his subjects. Behaviorally, Michael was also performing well. There had been no violent outbursts by Michael, he was better able to refocus and more readily accepted discipline. [T. 435-442].

Discussion

Tuition Reimbursement

The primary issue for adjudication in this matter is whether Petitioner is entitled to reimbursement from Respondent for the educational/related services costs including room and board that were incurred by Petitioner at an out-of-state residential treatment facility.

In School committee of the town of

Burlington, Mass. vs. Dept. of Education of the Commonwealth of Mass., 105 S. Ct. 1996 (1985), the Supreme Court found that reimbursement of special education expenses under the IDEA was an appropriate remedy if it was found that the public school's placement was not providing the child with a "free appropriate education' and that the parents alternative placement was "proper" under the act.1

Accordingly, for Petitioner to prevail on this issue, Petitioner must establish by a preponderance of the evidence that Michael was not being provided with a "free appropriatepublic education" by Cypress-Fairbanks Independent School District and that the Provo Canyon School, a residential treatment facility, was a proper placement under the act.

In deterring whether Michael was receiving a "free appropriate public education" at the time he was unilaterally residentially placed by his parents, this Hearing Officer is guided by the following two-fold inquiry set forth in Board of Education of Hendrick Hudson Cent. School Dist. vs. Rowley, 458 U.S. 176, 102 S.Ct. 3034 (1982):

> "First, has the State complied with the Act? And second, is the [IEP] developed through the Act's procedures reasonably calculated to enable the child to receive education

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1 In Florence county School District Four v. Carter, 20 IDLER 532 (U.S. 1993), the United States Supreme Court held that the IDEA's requirement that special education placement must meet state standards cannot be applied to unilateral parental placements. The Court reasoned that it would be inconsistent with the goals of the IDEA to forbid parents from placing their child at a private school that otherwise offers an appropriate education simply because the private school had not been authorized by the same public school system that failed to provide the student with a free appropriate public education.

benefits?"

Regarding the first inquiry, this Hearing Officer finds that Cypress-Fairbanks Independent School District has complied with the procedures set forth in the Act during Michael's 1992-93 school year and under Michael's 1993-94 individual education plan.

Petitioner contends that they were denied access to the ARD Committee process when Respondent failed to provide them with the opportunity to participate in an ARD Committee meeting prior to Michael's placement at Provo Canyon School. Specifically, Petitioner contends that they requested an emergency ARD Committee meeting prior to Michael's removal from school in order to seek approval for his residential placement and that they were denied such an emergency ARD Committee meeting.

This Hearing Officer finds no evidence to support allegations of any procedural violations or misconduct on the part of Cypress-Fairbanks Independent School District in no convening an ARD Committee as quickly as requested by the parents. Instead, the evidence presented established that the November 18, 1993, ARD Committee was convened as soon as practical after the request of the parents and that Michael's parents did participate and obtain a decision on their request for residential treatment.2

The second part of the Rowley inquiry is whether Michael's then current IEP was reasonably

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2 19 TEX. ADM. CODE §89.222(d) provides that a parent may request an ARD Committee meeting at any mutually agreeable time to address specific concerns about his or her child's special education program. Theschool district must respond to the parent's request either by holding the requested meeting or by requesting assistance through the Texas Education Agency's mediation process. There is no evidence that this regulation was violated by Cypress-Fairbanks Independent School District.

calculated to enable Michael to receive educational benefits. Michael was removed from school on November 4, 1993, and placed in Provo Canyon School on November 8, 1993. Michael's relevant IEP during this time period was the one developed at the October 4, 1993, ARD Committee meeting. At this meeting, the ARD Committee determined that Michael's behavior was not being adequately addressed in several of his regular classes. The ARD Committee determined that he required a more restrictive, self-contained, adaptive behavior classroom for his classes in math, language arts, and Texas history because he seemed to exhibit significant behavioral problems while in these classes. To provide Michael with his education in the least restrictive environment, the ARD Committee also decided to retain Michael in his regular education classes for science, reading, industrial technology, speech and physical education. Academically, IEP's were developed for Michael's adaptive behavior classes that incorporated the grade level essential elements of these courses. The ARD Committee also included an IEP for Secondary Behavior that included goals and objectives designed to help Michael develop responsibility for his actions. Additionally, the ARD Committee provided for Michael's use of the Content Mastery Center. Behaviorally, the adaptive behavior program had in place a behavior management system utilizing impulse control, earning points and achieving levels of recognition. a discipline contingency plan was also included that contained numerous contingencies for all teachers and administrators to use when faced with Michael's verbal and physical aggression. [R. Exh. #50].

From a review of the evidence presented, this Hearing Officer finds that Michael's IEP as developed at the October 4, 1993, ARD Committee meeting and

implemented from October 7, 1993, through November 4, 1993, was notreasonably calculated to confer upon Michael an educational benefit. Although the IEPs developed by the ARD Committee appear to be appropriate for addressing many of Michael's behavioral and academic concerns, the program simply does not provide the structure necessary for it to succeed. The evidence conclusively established that a similar program, tried during the previous school year, had not been successful in managing Michael's behavior at school.

This Hearing Officer has detailed in the findings of fact, the nature, extent, severity and frequency of the behavior that Michael displayed in school as a result of his Tourettes Syndrome and Attention Deficit Hyperactivity Disorder. Medication attempts to control what can best be characterized as a chronic period of increased symptoms from January, 1993, through November, 1993, had not resulted in any significant behavioral improvements.

Although Cypress-Fairbanks Independent School District properly provided in-service training to its teachers and administrators concerning Michael and his Tourettes Disorder, the nature, severity and frequency of his misbehavior was so overwhelming and pervasive that he could not be adequately controlled in either his regular classrooms or his adaptive behavior classroom.

The behavior management/discipline contingency plans implemented by Cypress-Fairbanks Independent School District throughout the 1992-93 and 1993-94 school years had not been successful in managing or effectively dealing with Michael's behavior. Michael's behavior, as a result of his Tourettes Syndrome, can only be characterized as extreme, outrageous and dangerous. It included the verbal and physical abuse of his teacher, school administrators and other students.

The evidence further established that Michael was suffering from low self-confidence and esteem and that his grades had been deteriorating. His October 26, 1993, Progress Report reflected that Michael was failing or receiving incompletes for failing to turn in work in all of his classes. [P. Exh. #102]. Although Respondent argued that had Michael remained in school and completed his assignments, he would have received passing grades, this assumes that Michael would have completed his assignments, a significant problem forMichael due to his behavior. There is no doubt that Michael had the intellectual ability to perform grade level work and to maintain passing grades in school. However, the reason he was performing poorly in school and receiving incompletes and failing grades were due to his misbehavior, including his periodic refusal to do work in class or his homework or to stay on task.

In Daniel R. v. State Board of Education, 874 F.2d 1036 (5th Cir. 19890, the Fifth Circuit discussed the importance that the IDEA places upon education students with disabilities with children who are not disabled. The court went on to acknowledge that there were numerous factors to consider when determining if a student should be mainstreamed into regular education classes. One factor the Court recognized that should be considered is the effect that a handicapped child's presence has on the regular classroom environment ant thus, on the education that the other students are receiving. The Court acknowledged that a student may, as a result of his handicap, engage in disruptive behavior and held that "[W]here a handicapped child is so disruptive in a regular classroom that the education of the other students is significantly impaired, the needs of the handicapped child cannot be met in that environment."

This Hearing Officer finds this to be the case

regarding Michael.

The severe and extreme types of conduct and behavior that Michael displayed in the classroom, i.e., cussing out his teachers, administrators and other students, throwing objects at his teachers, fighting, etc., were extremely disruptive to the educational process in the class, not to mention being utterly demeaning to his teachers, administrators and other students. Moreover, it occurred with such frequency in several of his classes that it necessarily denied other students with meaningful academic instruction. Such misbehavior, regardless of its origin, can only have the effect of impairing the traditional authoritative role of the teacher and administrator that is so important and necessary for maintaining an appropriate and safe school environment in which students can be educated.

Michael's disruptive behavior did not improve uponplacement in the adaptive behavior program but continued to occur at the same general frequency and level in both his regular education classes and his adaptive behavior class.

The only effective recourse the school district had for dealing with Michael's severe behaviors was to remove Michael from the educational setting, either through time-out, DMC, isolation in the Assistant Principal's office or emergency removal. This occurred with such frequency that Michael missed a substantial amount of academic and behavioral instruction due to his misbehavior.

Michael's teacher and administrators should be commended for their dedication and hard work in dealing with Michael. However, his behavior and conduct were to severe to be effectively dealt with and managed during a regular school day. For Michael to achieve any meaningful educational benefit, he needed to

learn how to control his impulsive and aggressive behavior. The only placement that stood any chance of meeting this goal was a highly structured 24-hour residential treatment facility capable of providing the consistent behavioral, emotional, social and educational support that Michael needed.

For the foregoing reasons, this Hearing Officer finds that Michael's IEP as developed at the October 4, 1993, ARD Committee meeting was inappropriate. It failed to provide the necessary structure and support that Michael required to adequately address his educational, emotional, behavioral and social needs. Because Michael was not receiving a free appropriate public education at the time he was unilaterally residentially placed by his parents at Provo Canyon School, reimbursement of his tuition and related expenses hinges on whether this residential placement was proper under the Act.

This Hearing Officer finds that Michael's placement at Provo Canyon School was proper.

Provo Canyon School is a 24-hour residential treatment facility that's designed to provide students with emotional and behavioral problems with a highly structured therapeutic environment in which to learn.

Michael required the structure of a 24-hour residential facility such as Provo Canyon School because his behaviorswee escalating both at home, in the school and the community and because he needed a much more structured, consistent and total program to address his needs than could be provided during the regular school day. [T. 32].

1992-93 IEPs and May 26, 1993 IEP

The remaining primary issue is whether Michael's 1992-93 IEPs were appropriate. From the

evidence presented, this Hearing Officer finds that Michael's IEPs, as periodically modified throughout the 1992-93 school year, were appropriate and reasonably calculated to provide Michael with an educational benefit. During this period, the ARD Committee properly responded to Michael's increasing misbehavior by modifying his IEP and placement to provided more structure and support for Michael. the actions of the ARD Committee were clearly reasonable based upon the facts and information that they possessed at that time. In response to Michael's misbehavior, he was provided with additional behavioral IEPs and plans designed to reduce his misbehavior, was partially placed into a more highly structured self-contained adaptive behavior classroom, and was provided with an aide to assist in behavioral control and programming. These modification were appropriate interim steps that were taken to determine if Michael's behavior could be effectively controlled in the school environment.

This Hearing Officer finds, however, that these steps were not successful in controlling Michael's behavior and that this was readily apparent at conclusion of the 1992-93 school year. In fact, despite these interventions, Michael's misbehavior continued to disrupt classes and his misconduct became so severe and unmanageable that he had to be emergency removed from school for the last three days of school. Accordingly, this Hearing Officer finds that the decision of the May 26, 1993, ARD committee to return Michael to a regular education environment for the 1993-94 school year to be contrary to the great weight of evidence available to the ARD Committee at the time and to be inappropriate. The ARD committee clearly acceded to the wishes of Michael's parents for this placement and thereby ignored the great weight of evidence that Michael'smisbehavior

was not exacerbated by his placement in the adaptive behavior class, that his misconduct had occurred at the same level and frequency before his placement in that class, and that Michael's conduct had not improved or been appropriately managed under any behavioral program offered by the school district.

Accordingly, this Hearing Officer finds that the May 26, 1993 ARD Committee's decision to return Michael to a regular education environment for the 1993-94 school year was inappropriate.

Transportation

Regarding the issue of transportation, this Hearing Officer finds that Michael's parents are not entitled to reimbursement for the transportation expenses they incurred for transporting Michael to and from school during the period from February, 1993 through November 1993, on the basis that the school district offered to provide special transportation to Michael and his parents refused this request.

CONCLUSIONS OF LAW

After due consideration to matters of record, matters of official notice, and the foregoing finding of fact, in my capacity as a special Education Hearing Officer for the State of Texas, I make the following conclusion of law:

1. Petitioner, Michael F., is an "other health impaired" student suffering from Tourettes Syndrome and Attention Deficit Hyperactivity Disorder who qualifies for special education services. [34 CRF Reg. 300.7(b)(8)].

2. Respondent, Cypress-Fairbanks Independent School District, being the district of Petitioner's residence, has the responsibility of providing Michael with a free appropriate public education. [20 U.S.C. §1400 et seq.]

3. Respondent provided Michael with a "free appropriate public education" during the 1992-93 school year. [Board of Education of Hendrick Hudson Cent. School Dist. a. Rowley, 458 U.S. 176; 102 S.Ct. 3034 (1982)].

4. Michael's IEPs, as developed at the May 27, 1993, and October 4, 1993, ARD Committee meetings were inappropriate for failing to provide the highly structured environment Michael needed to adequately address his emotional, social and behavioral needs. [Board of Education ofHendrick Hudson Cent. School Dist. a. Rowley, 458 U.S. 176; 102 S.Ct. 3034 (1982)].

5. Michael required a 24-hour highly structured program of consistent educational, social, behavioral and emotional support as was provided at Provo Canyon School. [School Com. of Burlington v. Dept. of Education of Mass., 171 U.S. 359 (1985); 34 CFR Reg. 300.302].

6. Petitioner is entitled to tuition reimbursement from Cypress-Fairbanks Independent School District for the educational/related services costs associated with his placement at Provo Canyon School, including non-medical care and room and board. [School Com. of Burlington v. Dept. of Education of Mass., 171 U.S. 359 (1985); 34 CFR Reg. 300.302].

7. Petitioner is a prevailing party on a significant issue.

ORDER

After due consideration of the record, the foregoing findings of fact and conclusions of law, this Hearing Officer ORDERS that Cypress-Fairbanks Independent School District reimburse Michael's parents for $15,978.20, being the educational/related services costs of Michael's residential placement at Provo Canyon

School from November 8, 1993 through February 11, 1994.

Finding that the public welfare requires the immediate effect of this Final decision, this Hearing Officer makes it effective immediately.

All other relief not expressly granted herein is DENIED.

SIGNED this 17th day of JUNE, 1994.

NOTICE TO THE PARTIES

Under newly revised State Board of Education rules, it is no longer necessary for a party to perfect an appeal to state district court by filing a Motion for Re-Hearing. However, either party may request, within ten (10) days after the date of this decision, specified additional or amended findings of fact or conclusions of law. 19 TEX. ADM. CODES Sec. 157.8(n)(o).

SYNOPIS

Issue: Parents of Tourettes Syndrome and ADHD student seek reimbursement for costs of unilateral out-of-state residential placement.

Held: For parents: Parents established that due to the nature and severity of the student's misconduct, both at home and at school, that he required a highly structured 24-hour residential placement to address his educational, emotional, behavioral, and social needs. Parents established that the out-of-state residential placement was appropriate for meeting student's educational, emotional, behavioral, and social needs. Accordingly, reimbursement ordered for costs of the out-of-state residential placement.

20 § 1412. Eligibility requirements

In order to qualify for assistance under this subchapter in any fiscal year, a State shall demonstrate to the Secretary that the following conditions are met:

•(1) The State has in effect a policy that assures all children with disabilities the right to a free appropriate public education.

•(5) The State has established (A) procedural safeguards as required by section 1415 of this title, (B) procedures to assure that, to the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled, and that special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily, and (C) procedures to assure that testing and evaluation materials and procedures utilized for the purposes of evaluation and placement of children with disabilities will be selected and administered so as not to be racially or culturally discriminatory. Such materials or procedures shall be provided and administered in the child's native language or mode of communication, unless it clearly is not feasible to do so, and no single procedure shall be the sole criterion for determining an appropriate educational program for a child.

20 § 1415. Procedural safeguards

4 (B) In any action or proceeding brought under this subsection, the court, in its discretion, may award reasonable attorneys' fees as part of the costs to the parents or guardian of a child or youth with a disability who is the prevailing party.

F.R.C.P. 54(d) Costs; Attorneys' Fees.

(1) *Costs Other Than Attorneys' Fees*. Except when express provision therefor is made either in a statute of the United States or in these rules, costs other than attorneys' fees shall be allowed as of course to the prevailing party unless the court otherwise directs; but costs against the United States, its officers, and agencies shall be imposed only to the extent permitted by law. Such costs may be taxed by the clerk on one day's notice. On motion served within 5 days thereafter, the action of the clerk may be reviewed by the court.

(2)

Supreme Court, U.S.
FILED
NOV 20 1997
CLERK

No. 97-691

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

MICHAEL F. b/n/f MR. AND MRS. BARRY F.

Petitioners,

vs.

CYPRESS-FAIRBANKS INDEPENDENT SCHOOL DISTRICT

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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93 pp

QUESTIONS PRESENTED

1. Was judgment properly granted against the Petitioners on their claims under the Individuals with Disabilities Education Act where the Fifth Circuit, applying well settled law, determined that the Respondent had provided the Petitioner Michael F. a free, appropriate public education prior to the time the Petitioners unilaterally removed him to an out-of-state residential treatment center?

2. When a school district prevails in a case brought under the IDEA, is an award of costs to the school district proper pursuant to Federal Rule of Civil Procedure 54?

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

SUMMARY 1

STATEMENT OF THE CASE 2
Proceedings Below 2
Statement of Facts 4

REASONS WHY THE PETITION SHOULD BE DENIED 10
A. The Petition does not Present an Important Question of Federal Law 10
B. The Fifth Circuit Decision does not Substantially Conflict with any Prior Decision of this Court or any other Court of Appeals 16
C. The District Court's Award of Costs Other than Attorneys' Fees to the Cy-Fair ISD Was Proper 20

CONCLUSION 24

TABLE OF AUTHORITIES

CASES

Alberti v. Klevenhagen, 46 F.3d 1347 (5th Cir. 1995) ... 21

Board of Educ. of Murphysboro Community Unit Sch. Dist. No. 186 v. Illinois State Bd. of Educ., 41 F.3d 1162 (7th Cir. 1994) 17

Board of Educ. v. Rowley, 458 U.S. 176, 102 S. Ct. 3034 (1982) 16, 17, 18, 19, 20

Bonnie F. v. Calallen ISD, 835 F. Supp. 340 (S.D. Tex. 1993), *affd*, 40 F.3d 386 (5th Cir. 1994), *cert. denied*, 115 S. Ct. 1796 (1995) 22

Buser v. Corpus Christi ISD, 20 IDELR 981, *aff'd* 51 F.3d 490 (5th Cir. 1995), *cert. denied*, 116 S. Ct. 305 (1995) 22

Capistrano Unified Sch. Dist. v. Wartenberg, 59 F.3d 884 (9th Cir. 1995) 13, 17

Chris D. v. Montgomery County Bd. of Educ., 753 F. Supp. 922 (N.D. Ala. 1990) 13

Clyde K. v. Puyallup Sch. Dist. No. 3, 35 F.3d 1396 (9th Cir. 1994) 13

Cypress-Fairbanks ISD v. Michael F., 931 F. Supp. 474 (S.D. Tex. 1996), *aff'd and modified*, 118 F.3d 245 (5th Cir. 1997) ..... vii, 14

Dodds v. Simpson, 1987 WL 49461 (D. Or. 1987) ... 21, 22

Doe v. Alabama State Dep't of Educ., 915 F.2d 651 (11th Cir. 1990) 18

Doe v. Defendant I, 898 F.2d 1186 (6th Cir. 1990) 18

Doyle v. Arlington County Sch. Bd., 953 F.2d 100 (4th Cir. 1991) 19

Fort Zumwalt Sch. Dist. v. Clynes, 119 F.3d 607 (8th Cir. 1997) 18

G.D. v. Westmoreland Sch. Dist., 930 F.2d 942 (1st Cir. 1991) 17

Gregory K. v. Longview Sch. Dist., 811 F.2d 1307 (9th Cir. 1987) 17

Hall v. Shawnee Mission School Dist., 856 F. Supp. 1521 (D. Kan. 1994) 13

Jefferson County Bd. of Educ. v. Breen, 853 F.2d 853 (11th Cir. 1988) 19

Jenkins v. Squillacote, 935 F.2d 303 (D.C. Cir. 1991) ... 23

M.R. v. Lincolnwood Bd. of Educ. Dist. 74, 843 F. Supp. 1236 (N.D. Ill. 1994) 13

Northcross v. Board of Educ., 611 F.2d 624 (6th Cir. 1979), *cert. denied*, 447 U.S. 911 (1980) 21

Oberti v. Board of Educ., 995 F.2d 1204 (3d Cir. 1993) . 19

Pierce v. Underwood, 487 U.S. 552, 108 S. Ct. 2541 (1988) 20

P.L. v. Norwalk Board of Educ., 22 IDELR 1119 (D.C. Conn. 1995) 22

Swift v. Rapides Parish Public School System, 812 F. Supp. 666 (W.D. La.), *aff'd*, 12 F.3d 209 (5th Cir. 1993) 13

Teague ISD v. Todd L., Civ. No. W-91-CA-276 (W.D. Tex. 1992), *affd*, 999 F.2d 127 (5th Cir. 1993) 13, 16, 22

Town of Burlington v. Department of Educ., 736 F.2d 773 (1st Cir. 1984), *affd*, 471 U.S. 359, 105 S. Ct. 1996 (1985) 17, 18, 20

STATUTES

Fed. R. Civ. P. 54(d)(1) 1, 2, 4, 20, 21, 22, 23, 24

20 U.S.C. § 1412(5) 6

20 U.S.C. § 1415 ..... 2, 16, 18, 20, 22

34 C.F.R. § 300.551-552 6

2 U.S. Code Cong. & Admin. News 1425-1508 (1975) . . 24

2 U.S. Code Cong. & Admin. News 1503 (1975) 18

4 U.S. Code Cong. & Admin. News 1798-1810 (1986) . . 24

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CYPRESS-FAIRBANKS INDEPENDENT
SCHOOL DISTRICT

Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

The Respondent, Cypress-Fairbanks Independent School District, respectfully requests that this Court deny the petition for writ of certiorari, which seeks review of the Fifth Circuit Court of Appeals' decision in this case. The decision of the Fifth Circuit is reported at 118 F.3d 245 (5th Cir. 1997). The decision of the District Court is reported at 931 F.Supp. 474 (S.D. Tex. 1996).

SUMMARY

The Petition should be denied. This case concerns the Individuals with Disabilities Education Act (IDEA) and a disabled student's attempt to obtain reimbursement for costs associated with the student's parents' unilateral decision to place the student in a residential treatment facility. It involves the application of well-settled rules of law to a particular set of facts. In an attempt to elevate this case into one worthy of review, Petitioners have disregarded large portions of the record and have ignored case law concerning the IDEA, as well as Rule 54 of the Federal Rules of Civil Procedure. This case ultimately turns on the specific facts reviewed by the Fifth Circuit Court of Appeals and the application of the requirements of the IDEA and the Federal Rules of Civil Procedure to those facts, not on important issues of federal law. Petitioners merely are asking the Court to provide yet another level of appellate review of the facts to the district court's determination that Petitioners were not entitled to reimbursement of costs of treatment at a private residential facility.

Contrary to the Petition, the voluminous record in this case shows that the program offered to the student by the school district at the time of his removal to a private residential treatment facility was individualized on the basis of his assessment and performance, administered in the least restrictive environment, provided in a coordinated and collaborative manner, and resulted in positive academic and non-academic benefits. Accordingly, the Fifth Circuit Court of Appeals properly recognized that the student was provided a free appropriate public education in accordance with the IDEA. The Petitioners' claim that the courts below applied an improper standard of review is simply incorrect.

Finally, the Petitioners' claim that an award of costs to a prevailing school district under Federal Rule of Civil Procedure 54 violates the IDEA is not supported by the plain language of the IDEA or its legislative history.

In short, the Petitioners merely disagree with the specific application of the law to their own unique set of facts. The Petitioners offer no compelling basis for review of the decision below.

STATEMENT OF THE CASE

Proceedings Below

This action was brought on August 25, 1994 in the Southern District of Texas, Houston Division, by the Cypress-Fairbanks Independent School District (Cy-Fair ISD) as an appeal of the Texas Education Agency hearing officer's decision, *Michael F. b/n/f Mr. & Mrs. Barry F. vs. Cypress-Fairbanks Independent School District*, Docket No. 070-SE-1193. The appeal to the district court was brought pursuant to the Individuals With Disabilities Education Act, specifically 20 U.S.C. § 1415.[1] The Cy-Fair ISD appealed the hearing officer's decision which ordered the reimbursement of costs associated with the Petitioners' unilateral decision to place their son, Michael, in a Utah psychiatric treatment facility, Provo Canyon School ("PCS").

The state administrative hearing officer held that Michael received a free appropriate public education ("FAPE")

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[1]The IDEA was amended, effective June 4, 1997. Because all facts and decisions in this case occurred before the statute was amended, the IDEA prior to the 1997 amendments is applicable to this case. All citations to the IDEA are prior to the 1997 amendments.

during the 1992-1993 school year and that Cy-Fair ISD complied with the procedural requirements under the IDEA during the entire relevant period. (*See* Decision of the Hearing Officer, Texas Education Agency Record ("TEA record"), Vol. I at 36, 44). The hearing officer, however, held that the individual education plans ("IEP's") developed for Michael on May 26, 1993 and October 4, 1993 were inappropriate because they failed to provide him with educational benefit. *Id.* at 38, 43. The hearing officer concluded that Michael's placement at PCS was proper and ordered Cy-Fair ISD to reimburse Michael's parents $15,978.20 for the PCS placement.

Cy-Fair ISD appealed the hearing officer's decision and challenged, *inter alia*, whether the hearing officer's decision to require reimbursement was correct. This issue was to be resolved by determining whether Michael's IEP's developed on October 4, 1993 and November 18, 1993 were reasonably calculated to confer educational benefit on Michael. Michael's parents did not seek additional findings of fact or conclusions of law or appeal any portion of the hearing officer's decision.

The district court received additional evidence at a hearing held on September 5, 1995. (R. 733-737, 921). Following this hearing and an extensive review of the administrative record, the district court rendered judgment for Cy-Fair ISD on December 13, 1995. (R. 801).[2] The district court ruled that the IEP's in effect when Michael resided in the

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[2]The record developed in this case consists of the docket entries developed in the district court proceeding, ten volumes of transcript and exhibits entered at the administrative hearing before the Texas Education Agency hearing officer, the transcript of the proceedings from the district court hearing held on September 5, 1995, as well as the exhibits entered at the hearing.

residential treatment facility were in compliance with the IDEA. The lower court's order reversed the hearing officer's decision that the IEP's were inappropriate and that Michael was entitled to reimbursement. The district court also ordered that Cy-Fair ISD recover its costs of court, other than attorneys' fees, from the Petitioners pursuant to FED. R. CIV. P. 54, and specifically awarded costs in the amount of $6,770.05 on February 15, 1996. Petitioners filed a motion for new trial, which was denied (R. 808, 907).

Petitioners filed a notice of appeal on March 11, 1996. The Fifth Circuit heard oral argument on May 2, 1997 and rendered a written opinion on July 15, 1997, affirming the district court's decision in all respects regarding the school district's provision of a free appropriate public education but modifying the award of costs, reducing them to $3,837.40. Petitioners filed a petition for writ of certiorari on October 14, 1997.

Statement of Facts

The Petition omits and misstates many important facts that are essential to understanding why Michael F. was provided a free appropriate public education by Cy-Fair ISD and why this case is not worthy of review by the Court. Accordingly, the Respondents provide their own statement of the material facts as follows:

Michael's family moved into the boundaries of Cy-Fair ISD in the summer of 1992. Michael enrolled as a sixth grader at Cy-Fair ISD's Hamilton Intermediate School ("Hamilton IS") for the 1992-1993 school year. At various times, Michael has been diagnosed with bi-polar disorder, severe depression, attention deficit hyperactivity disorder, and, most recently, Tourette's Syndrome. Michael's disorder is characterized by four features, namely (1) hyperactivity and decreased attention,

(2) obsessive compulsive behavior, (3) rapid mood swings, and (4) tics and twitches. In the fall of 1992, he was identified as "other health impaired" for purposes of receiving educational services under the IDEA. (TEA record, Vol. IX, Respondent's Exhibit 2).

For the 1993-1994 school year, Michael initially enrolled at Cy-Fair ISD's Bleyl Junior High School ("Bleyl JHS"). (TEA record, Vol. IX, Respondent's Exhibit 9). On November 4, 1993, Michael's parents unilaterally withdrew Michael from Bleyl JHS and moved him to Utah at their own expense for approximately four months.

During the time period Michael was enrolled in the Cy-Fair ISD, his placements ranged from fully mainstreamed regular classroom instruction to a self-contained placement in an adaptive behavior classroom.[3] Michael always had access, however, to non-disabled peers. These placements, as well as Michael's educational program, were altered at different intervals in response to Michael's behaviors and learning styles exhibited in the various environments. Eight Admission, Review and Dismissal ("ARD") Committee meetings were held between October of 1992 and November of 1993. (TEA record, Vol. IX, Respondent's Exhibits 2, 4, 5, 6, 8, 9, 50, and 65, respectively). At each of the meetings, school staff, as well as Michael's parents, reviewed his progress and made

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[3]An adaptive behavior class is one which is designed to help students with inappropriate behavior. The student stays in the same classroom for several subjects and a point structure is utilized which enables the student to gain rewards throughout the class period by exhibiting appropriate behavior. *See* TEA record, Vol. VI, pgs. 2482-2484.

recommended changes to his IEP and placement[4] to adjust for his varying behaviors in the Cy-Fair ISD's program.

During this time period, Michael exhibited much of the behavior typical of an adolescent suffering from the disabilities of Tourette's Syndrome, severe depression, bi-polar disorder, and attention deficit hyperactivity disorder. Michael's teachers documented each instance of inappropriate behavior exhibited during his enrollment in Cy-Fair ISD. The Petition completely ignores the actions of Cy-Fair ISD in response to these behaviors and the progress demonstrated by Michael during his time within the Cy-Fair ISD as noted by the district court and again by the Fifth Circuit Court of Appeals.

Michael was privately placed by his parents at PCS in Utah on November 8, 1993. (*See* Transcript of District Court Hearing, p. 259). The district court concluded that the IEP's in effect during Michael's placement at PCS were the ones to be considered in determining whether Michael had available to him a free appropriate public education. The parents have never challenged, through the district court appeal or the appeal to the Fifth Circuit, Cy-Fair ISD's compliance with any procedural requirements of the IDEA. Accordingly, the proper focus of the district court and the Fifth Circuit Court of Appeals was on the IEP's in effect at the time Michael withdrew from Bleyl JHS and while he was in PCS. The district court also analyzed the May 26, 1993 IEP in determining that Michael was benefiting from his educational program. The district

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[4]The term "placement" refers to the type of classroom or educational setting in which instruction takes place. A regular education classroom is the least restrictive environment. A school district is required to provide a continuum of placements moving from least to most restrictive. 20 U.S.C. § 1412(5) and 34 C.F.R. § 300.551-552

court found that Michael was receiving benefit at all relevant times.

The initial IEP for the 1993-1994 school year was developed on May 26, 1993. The ARD committee determined that Michael could be placed in regular education classes for the upcoming school year. The IEP included support services for the regular education classes, such as a discipline contingency plan, a behavioral intervention plan, psychological services, a tracking teacher to monitor his progress, and a handpicked team of teachers who were to receive training to deal with Michael and his disabilities. Additionally, an extra set of textbooks was to be sent to Michael's home for use during the year, and a detailed discipline contingency plan was developed for the teachers to utilize in dealing with Michael's behavior. Michael's parents attended this ARD committee meeting, signed the report, and noted their agreement with the IEP and placement for the 1993-1994 school year. (TEA record, Vol. IX, Respondent's Exhibit 9).

The October 4, 1993 IEP was developed at an ARD committee meeting which was called in response to behavioral difficulties exhibited by Michael. (TEA record, Vol. IX, Respondent's Exhibit 50). By this time, Michael had already received a progress report for the first half of the first six weeks. The district court found that Michael was passing all but one class and received at least "satisfactory" marks in conduct in all but two of his classes. (TEA record, Vol. IX Respondent's Exhibit 52 at 1630). However, the majority of the teachers indicated that Michael was having a problem turning in completed work.

The October IEP developed by Michael's ARD committee was individualized in response to Michael's difficulties which were mainly behavioral problems and completing assignments in his mainstream classes. The

October IEP required that Michael attend adaptive behavior ("AB") classes, rather than mainstream, for three subjects: math, language arts, and Texas history. It was also determined that Michael was eligible for content mastery classes when necessary. Additionally, the discipline contingency plan remained in place with the addition of the option for teachers to send Michael to a discipline management class for the remainder of the class period, as opposed to an emergency removal from class, when his behavior escalated. These modifications were made to the IEP in an effort to accommodate and deal with Michael's behavior problems while continuing to keep him in mainstream classes to the greatest extent possible. (TEA record, Vol. IX, Respondent's Exhibit 50).

This ARD committee meeting was attended by all the key "stakeholders" in Michael's education -- his parents, the chairperson of the special education department at Michael's school, a psychologist from the school district, the educational diagnostician, a counselor, an assistant principal from Michael's school, and Michael's special education teacher from the adaptive behavior class who also served as his tracking teacher. Michael's parents signed the ARD committee report denoting their agreement with the new educational plan and placement. (TEA record, Vol. IX, Respondent's Exhibit 50 at 1627). The IEP was developed and approved by a group of professionals and Michael's parents. Furthermore, implementation of the IEP required that the ARD committee members and the teachers in the school work together in order to accommodate Michael's behavior problems while educating him.

Michael's parents unilaterally removed Michael from the Cy-Fair ISD on November 4, 1993, only a month after the development of the October IEP, and too short a period of time

for Michael to reap the full benefit of the October IEP. Immediately prior to withdrawing from the Cy-Fair ISD's program, however, Michael continued to be able to attend regular lunch and to pass in the hallways between classes without being escorted by school staff. Only one assaultive incident occurred in the lunchroom and the halls in the fall of 1993, the minor offense of taking a bite of someone else's pizza. (TEA record, Vol. V, at pg. 1916). For the first six weeks, Michael received passing grades in all but one class. (TEA record, Vol. IX, Respondent's Exhibit 54 at 1632).

On October 26, 1993, Michael received his progress report for the first half of the second six weeks. The progress report reflects that he was failing all but one of his classes at the time. (TEA record, Vol. IX, Respondent's Exhibit 53 at 1631). However, most of the teachers indicated that assignments were not turned in, which resulted in the low grades. The district court and the Fifth Circuit found that by the time Michael was withdrawn from the Cy-Fair ISD, he was passing four of his classes and was very close to receiving passing grades in two additional classes. (TEA record, Vol. IX, Respondent's Exhibit 54 at 1632). He remained in regular education classes for industrial technology, science, reading, speech, and P.E. During the fall of 1993, his behavior in industrial technology, science, and reading was appropriate at all times until the last few days of his attendance when Michael knew he was going to be sent away to Utah by his parents, and had expressed great concern about leaving. (TEA record, Vol. V, pgs. 1975-1976, 2001-2002; Vol. VI, pgs. 2103-2105). The district court and the Fifth Circuit found that Michael's passing grades, his participation and behavior in his classes, and his ability to pass through the halls from class to class and attend lunch unsupervised were signs of positive benefits from his IEP, both academic and behavioral.

After Michael's withdrawal from the Cy-Fair ISD, his ARD committee met on November 18, 1993, at Michael's parents' request, to review his IEP. The ARD committee determined that the IEP should be modified slightly, but did not agree with Michael's parents' request for the Cy-Fair ISD to pay for his placement at PCS. The ARD committee felt that the Cy-Fair ISD could provide him with a free appropriate public education in a less restrictive environment than PCS. The November IEP modified the October IEP by excluding Michael from suiting-up for his physical education class, providing for the implementation of a social behavior curriculum, and offering the services of the Family School Preservation Team to Michael and his family.

Michael's parents did not agree with the decisions reached at the November ARD committee meeting. The IEP developed at this ARD committee meeting, however, was individualized to address Michael's needs in the least restrictive environment. It was developed and was to be implemented in a collaborative manner by the staff at Michael's school. The district court along with the Fifth Circuit held that the November IEP was similar to the October IEP, which did produce positive benefits. The district court and the Fifth Circuit found that the November IEP was, therefore, reasonably calculated to produce educational benefit for Michael.

REASONS WHY THE PETITION SHOULD BE DENIED

A. The Petition does not Present an Important Question of Federal Law.

The Petitioners' claim that Michael was not receiving educational benefit in Cy-Fair ISD mischaracterizes the evidence and, moreover, provides no compelling basis for this

Court to grant certiorari. The Petitioners are merely requesting another layer of appellate review of the evidence.

Moreover, the decision below presents no issues requiring correction by the Court. The district court and the court of appeals each set forth detailed, specific factual examples of the appropriateness of the educational program offered to Michael by the school district as well as academic and non-academic benefit which he displayed during relevant time periods. This included unrefuted testimony from Michael's regular education teachers that, while he was enrolled in class during the fall of 1993 he was generally on task (TEA record, Vol. VI, at pg. 2097), demonstrated enthusiasm by volunteering for assignments (TEA record, Vol. VI, at pg. 2097), often controlled his own behavior by asking for permission to sit down and putting his head on his desk (TEA record, Vol. VI, at pg. 2098), worked well in small groups (TEA record, Vol. VI, at pg. 2275), and was able to bring his behavior under control after several reminders (TEA record, Vol. VI, at pg. 2350-51).

Michael's special education teacher reported that his ability to respond to him as a teacher improved along with his ability to carry on a mature conversation (TEA record, Vol. VI, at pg. 2415). His teacher also reported that he was improving in his ability to control his urges to interrupt class with inappropriate comments and behavior and was complying with the general focus of the adaptive behavior classes (TEA record, Vol. VI, at pg. 2415-16). Administrative staff as well as Michael's psychologist reported that his appropriate behavior was improving while in the adaptive behavior classroom (TEA record, Vol. V, at pg. 1949-50; Vol. VII, at pg. 2831). All staff who were in direct and frequent contact with Michael reported that he did not pose a danger to students or staff at his school (TEA record, Vol. V, at pg. 1964) (*see also* testimony of Dr.

Bernard Rosenberg, R. 921, pgs. 126-127). This unrefuted testimony demonstrated that Michael was receiving genuine educational benefit in his program, both academically and non-academically, at the time of his removal by his parents.

The state hearing officer's decision concentrated upon the listing of behavioral infractions Michael committed over his entire tenure in school and ignored the significant amount of testimony provided by Michael's regular education teachers, special education teacher, psychologist, and administrators who all testified about the observable progress he made both in and out of classroom areas. The district court noted that it was cognizant of Michael's discipline incidents but held that there was sufficient positive benefits displayed to demonstrate that his program provided him with an appropriate education. The district court gave "due weight" to the hearing officer's findings but also accepted additional evidence at the hearing on September 5, 1995. By a preponderance of *all* of this evidence, the district court properly concluded that the school district had offered Michael a free appropriate public education.

The Fifth Circuit considered the appropriateness of Michael's IEP as a mixed question of fact and law on a de novo basis, reviewed all of the evidence submitted, and came to the same conclusion. The Fifth Circuit also properly reviewed the district court's findings of fact for clear error and concluded that the district court committed no reversible error in determining that Michael's IEP's and his placement within the Cy-Fair ISD were appropriate under the IDEA. The Fifth Circuit made specific mention of the testimony of Michael's regular education teachers, special education teacher, and psychologist as support for the factual findings of the district court, as well as the testimony of Michael's own treating psychiatrist at the time of his diagnosis with Tourette's Syndrome, who testified it would be inappropriate to remove Michael from school when

he was experiencing success in many of his classes. All of this testimony was virtually ignored by the administrative hearing officer. *Compare Hall v. Shawnee Mission School Dist.*, 856 F.Supp. 1521, 1528-29 (D. Kan. 1994) (IEP calling for partial placement in adaptive behavior class was reasonably calculated to produce educational benefit as demonstrated by child's academic achievement on par with his grade level and gradually improving behavior, despite continuing behavior problems at home), and *Swift v. Rapides Parish Public School System*, 812 F.Supp. 666 (W.D. La.), *aff'd*, 12 F.3d 209 (5th Cir. 1993) (same), and *Teague Indep. Sch. Dist. v. Todd L.*, 999 F.2d 127, 132 (5th Cir. 1993) (educational benefit of IEP designed for seventeen-year old boy with various behavior, learning and speech disorders evidenced by testimony of student's teacher and school psychologist, fact that student advanced in terms of grade level, and student's increasing ability to focus on particular tasks).

The Petitioners' seem to argue that any child who exhibits significant behavioral disabilities should automatically be placed outside of the regular classroom in a residential placement. This argument defies the holdings of this Court, the language of the IDEA, and common-sense. The Petitioners cite *Clyde K. v. Puyallup Sch. Dist. No. 3*, 35 F.3d 1396 (9th Cir. 1994); *Capistrano Unified Sch. Dist. v. Wartenberg*, 59 F.3d 884 (9th Cir. 1995); *M.R. v. Lincolnwood Bd. of Educ. Dist. 74*, 843 F.Supp. 1236 (N.D. Ill. 1994); and *Chris D. v. Montgomery County Bd. of Educ.*, 753 F.Supp. 922 (N.D. Ala. 1990) as support for Michael F.'s claim that the Fifth Circuit relied on "form over substance" in determining that reimbursement for residential care was not justified in this case. These cases, however, considered students' individual responses to different educational programs and do not stand for any general rule of law, but, rather, the individual

application of legal principles to a unique set of facts. The Fifth Circuit, citing the "strong factual support for the district court's decision," properly held that such cases were inapplicable and readily distinguishable. *Cypress-Fairbanks ISD v. Michael F.*, 118 F.3d at 256, n. 30.

Finally, the Petitioners' version of the facts simply is not supported by the record. The Petitioners contend that Michael's behavior remained unchanged from the date of his placement in the adaptive behavior classroom for three classes in October, 1993 until his removal to PCS in November, 1993. The Petitioners overlook, however, the fact that Michael exhibited only a single instance of physical aggression towards anyone from the time he entered this class until the time of his removal. (TEA Record, Vol. IX, Respondent's Exhibit 61). They also overlook the fact that he was emergency-removed from school only once for a one-half day period following his adaptive behavior classroom placement (TEA record Vol. IX, Respondent's Exhibit 62); that during all of the Fall of 1993, Michael ate his lunch in the school cafeteria unattended and passed in the hallways from class to class without being escorted by school staff (TEA Record, Vol. VI, pgs. 2098, 2275, 2350-51, 2415-16); and that he was receiving passing grades in most of his academic and non-academic classes at the time of his removal from Cy-Fair ISD (TEA Record, Vol. IX, Respondent's Exhibit 54).

In their Statement of the Case, the Petitioners also directly misstate some aspects of the evidence. The Petitioners focus on Michael's performance in the "hallways" of his junior high school. They infer that such performance was the only indicia of academic and non-academic benefit identified by the Fifth Circuit and the district court. However, the few instances referenced in the Petitioners' brief of Michael's misbehavior are often incorrectly reported or taken out of context. For instance,

on September 29, 1993, Michael did not get into a fight in the hall as the Petitioners have asserted. According to the documentation in the exhibits, Michael was speaking out in the library and was then escorted to the office by a teacher. There was no fight involved at all according to the record. (TEA record, Vol. VIII, Petitioner's Exhibit 115 at 1280.) The Petitioners claim that on October 1, 1993, Michael walked into the class from the hall screaming when in actuality, Michael entered the room, then began to ask where another student was. (TEA record, Vol. VIII, Petitioner's Exhibit 100 at 1245.)

Another mischaracterization is cited by the Petitioners as having occurred on October 22, 1993. First, Petitioners cite to a page of the Record dated October 4, 1993, not October 22, 1993 as Petitioners have alleged. Second, the Petitioners assert that Michael "could not walk alone and had to be escorted by a principle [sic]." Nothing, however, is noted in the record of Petitioner walking to the office or being escorted by a principal on that day. All that was shown was that Michael had *chosen* to go to the office after misbehaving. (TEA record, Vol. VIII, Petitioner's Exhibit 115 at 1283.) On October 27, 1993, the record showed that Michael was engaged in horseplay with another student. Petitioners, however, claimed that Michael "poured a can of lemonade on a teacher's head in the hall," another misstatement of the record. (TEA record, Vol. VIII, Petitioner's Exhibit 115 at 1291.) Finally, there is nothing in the record to indicate that Michael was "cited for destruction of school property in the hallway" on November 3, 1993, as the Petitioners claim. Michael had actually pulled down posters in the hall. Also, he was not "cursing loudly in the hallway." All that was shown in the record on November 3, 1993 was that Michael had called his teacher one name. (TEA record, Vol. VIII, Petitioner's Exhibit 115 at 1298.)

Clearly, the parties still dispute the evidence. Two reviewing courts have combed the voluminous record and have come to the same conclusion based on the evidence. This Court should not expend its resources in a third review of the facts.

B. The Fifth Circuit Decision does not Substantially Conflict with any Prior Decision of this Court or any other Court of Appeals.

The standard of review that a district court must give an administrative hearing officer's decision is set forth by the IDEA itself and prior decisions of this Court. When a federal district court reviews a state hearing officer's decision in an impartial due process hearing under the IDEA, the court must receive the record of the administrative proceedings and is then required to take additional evidence at the request of any party. 20 U.S.C. § 1415(e)(2). In this case, the Fifth Circuit has made note that, while a district court must accord "due weight" to a hearing officer's findings, the court must ultimately reach an independent decision based on a preponderance of the evidence. *See Board of Educ. v. Rowley*, 458 U.S. 176, 205, 102 S.Ct. 3034, 3050 (1982); 20 U.S.C. § 1415(e)(2). The Fifth Circuit has characterized this statutory requirement for review as "akin" to a "trial de novo." *Teague Indep. Sch. Dist. v. Todd L.*, 999 F.2d at 131.

The Petitioners incorrectly suggest that an independent review by the district court is impermissible under the IDEA as well as this Court's prior holdings. Not only is an independent review called for under the statute and this Court's holding in *Rowley*, the Fifth Circuit's standard of review reflects virtually all circuits' holdings in this area and, in fact, is specifically

adopted by two of the three decisions cited by the Petitioners for evidence of contrary holdings.

The Seventh Circuit recently held that a district court must make an independent determination of whether the requirements of the IDEA have been satisfied. *Board of Educ. of Murphysboro Community Unit Sch. Dist. No. 186 v. Illinois State Bd. of Educ.*, 41 F.3d 1162, 1166 (7th Cir. 1994). The court stated that the determination of whether a school district has provided a free appropriate public education is a "mixed question of law and fact which we review de novo." *Id.*

The court maintained that "Congress specifically rejected language which would have made state administrative findings conclusive if supported by substantial evidence." *Id.* (citing *Board of Educ. v. Rowley*, 458 U.S. 176, 205, 102 S.Ct. 3034, 3050 (1982)). However, the court also recognized that courts do not have special expertise in the area of education and should not substitute their judgment for that of school authorities. *Id.* Therefore, the "due weight" element of *Rowley* was incorporated into the de novo standard of review. *Id.*

Likewise, the Ninth Court of Appeals has adopted the same standard of review as the Fifth Circuit. In *Capistrano Unified Sch. Dist. v. Wartenberg*, 59 F.3d 884, 891 (9th Cir. 1995), the court held that while the court is to review the administrative findings carefully, the court is free to accept or reject those findings. *Id.* (citing *Gregory K. v. Longview Sch. Dist.*, 811 F.2d 1307 (9th Cir. 1987); *Town of Burlington v. Department of Educ.*, 736 F.2d 773, 792 (1st Cir. 1984), *aff'd*, 471 U.S. 359, 105 S.Ct. 1996 (1985)).

Other courts of appeals have also identified the same standard of review utilized by district courts in the Fifth Circuit. *See G.D. v. Westmoreland Sch. Dist.*, 930 F.2d 942, 945 (1st Cir. 1991) (holding that the trial court's review is short of complete de novo review but the precise degree of deference

is "left to the discretion of the trial court") (quoting *Town of Burlington v. Department of Educ.*, 736 F.2d 773, 792 (1st Cir. 1984), *aff'd*, 471 U.S. 359, 105 S.Ct. 1996 (1985)); *Doe v. Defendant I*, 898 F.2d 1186, 1190 (6th Cir. 1990) (addressing the issue of whether a student's individualized education plan constituted a free appropriate public education and holding that "de novo" review was the applicable standard); *Fort Zumwalt Sch. Dist. v. Clynes*, 119 F.3d 607, 611 (8th Cir. 1997) (making the determination that whether a school district has provided a free appropriate public education is a mixed question of law and fact and the standard of review is de novo); *Doe v. Alabama State Dep't of Educ.*, 915 F.2d 651, 657 n.3 (11th Cir. 1990) (stating that while the court must consider the administrative findings of fact, the court is free to accept or reject them).

These decisions reflect the standard of review mandated by the IDEA as well as this Court in *Board of Educ. v. Rowley*. The parties in *Rowley* disagreed over whether the IDEA's language indicated a "de novo" standard of review or a severely restrictive standard of review. *Rowley*, 458 U.S. at 205, 102 S.Ct. at 3050. This Court explicitly rejected the severely restrictive review, noting that the Senate Conference Committee rejected language in the statute requiring administrative findings to be conclusive and decided instead that the district court must make "independent decisions based on a preponderance of the evidence." *Id.* (citing S. Conf. Rep. No. 94-455, p.50 (1975), U.S. Code Cong. & Admin. News 1975, p.1503). Although this Court relied on the legislative history of the IDEA, it did not grant full authority to the reviewing court. This Court interpreted section 1415(e) to carry an implied requirement that "due weight" must be given to the administrative proceedings. *Rowley*, 458 U.S. at 206, 102 S.Ct. at 3051.

Other courts have interpreted the purpose of the "due weight" requirement as articulated in *Rowley* as a means of keeping the courts from imposing their views of appropriate educational methods on the states. In *Oberti v. Board of Educ.*, 995 F.2d 1204, 1219 (3d Cir. 1993), the Third Circuit held that the "due weight" is owed to the *administrative proceedings*, not to the party who happened to prevail in those proceedings." *Id.* (emphasis in the original.) The amount of deference due to the proceedings is ultimately left to the discretion of the district court. *Id.* The court must consider the administrative findings, but is free to accept or reject them. *Id.* (citing *Jefferson County Bd. of Educ. v. Breen*, 853 F.2d 853, 857 (11th Cir. 1988).

Only the Fourth Circuit has held that the findings of fact of a hearing officer are entitled to presumptive validity or prima facie correctness. *Doyle v. Arlington County Sch. Bd.*, 953 F.2d 100, 105 (4th Cir. 1991). However, the Fourth Circuit opinion also states that, after giving the administrative findings due weight, the district court is free to decide the case on the preponderance of the evidence as required by the IDEA. *Id.* "If the district court is not going to follow the administrative findings, the court should explain the reason why." *Id.* Thus, although the Fourth Circuit provides for a greater degree of deference to administrative findings than other circuits, a district court in the Fourth Circuit is still given the opportunity to accept or reject those findings. In this case, the results would have been the same whether it had been filed in the Fourth or the Fifth Circuit. The findings of the hearing officer were not rejected by the district court, but, rather, incorporated into the district court's consideration of *all* of the evidence. The district court and the Fifth Circuit did not ignore the reports of Michael's inappropriate behavior but considered them in light of the unrefuted progress reported in the testimony and documents entered into evidence, progress

which the administrative hearing officer completely ignored in his decision.

The statute itself, along with decisions of this Court, have clearly identified a preponderance of the evidence standard of review for cases under the IDEA and have identified the district court's obligation to hear additional evidence. *Town of Burlington*, 471 U.S. 359, 363, 105 S.Ct. 1996, 1999 (1985); *Board of Educ. v. Rowley*, 458 U.S. at 206, 102 S.Ct. at 3051; 20 U.S.C. § 1415(e)(2). The district court weighed all of the evidence which was introduced at the administrative hearing as well as at its own hearing on September 5, 1995 and, by a preponderance of the evidence, determined that Michael had been offered a free appropriate public education.

The Petitioners' contention that a significant conflict in decisions on this issue exists between the circuit courts of appeals is simply incorrect. In all circuits, the final decision of whether a child has been provided an appropriate education is left to the district court to be determined by a preponderance of all the evidence. Because no conflict is presented, review by this Court is unwarranted.

C. The District Court's Award of Costs Other than Attorneys' Fees to the Cy-Fair ISD Was Proper

The Petitioners assert an award of costs pursuant to Rule 54 of the Federal Rules of Civil Procedure violates the IDEA. The Petitioners cite no cases whose holding supports this proposition. The case cited by Petitioners does not address costs granted pursuant to Rule 54. The district court's award of costs to Cy-Fair ISD was proper.

The standard of review in an award of costs is abuse of discretion. *Pierce v. Underwood*, 487 U.S. 552, 108 S.Ct. 2541

(1988); *Alberti v. Klevenhagen*, 46 F.3d 1347, 1358 (5th Cir. 1995). The district court's award of costs other than attorneys' fees in this matter was not an abuse of discretion. As noted by the district court, and the Fifth Circuit, Fed. R. Civ. P. 54(d)(1) ("Rule 54") provides that "[e]xcept when express provision therefore is made either in a statute of the United States or in these rules, costs other than attorneys' fees shall be allowed as of course to the prevailing party unless the court otherwise directs...." Fed. R. Civ. P. 54(d)(1). While the IDEA expands Rule 54 to allow for reasonable attorneys' fees as a part of the costs to *parents* who prevail, this expansion in no way limits the costs other than attorneys' fees allowable by Rule 54. Pursuant to Rule 54 and the "plain meaning" of the statute, Cy-Fair ISD, as a prevailing party, was entitled to certain costs as a matter of course. Accordingly, Petitioners' argument is without merit.

Petitioners assert that the district court's award of costs to Cy-Fair ISD was unjust. Petitioners assert that the IDEA only intended that costs be awarded to prevailing parties when such parties are parents and children. The IDEA contains no such provision barring an award of costs other than attorneys' fees to a school district. In fact, several courts have awarded costs to prevailing party school districts in actions originally brought under the IDEA and its predecessor, the Education for All Handicapped Children Act ("EHA").

In *Dodds v. Simpson*, 1987 WL 49461 (D. Or. 1987), the parents of a disabled child brought an action under the EHA. The school district prevailed. Accordingly, the court awarded costs to the district, relying on *Northcross v. Board of Educ.*, 611 F.2d 624, 640 (6th Cir. 1979), *cert. denied*, 447 U.S. 911 (1980), and reasoned that under FED. R. CIV. P. 54(d), "the prevailing party in a civil rights action is in the same posture as [a] prevailing party in any other action with regard

to costs . . . . [C]osts are awarded as of course to the prevailing party." *Dodds*, page 2. Under *Dodds* and Rule 54, the Cy-Fair ISD was entitled to costs "as a matter of course." Hence, the district court and the Fifth Circuit did not abuse their discretion by allowing Cy-Fair ISD certain costs other than attorneys' fees.

In awarding costs under the IDEA, the district court in *P.L. v. Norwalk Board of Educ.*, 22 IDELR 1119 (D.C. Conn. 1995), discussed the IDEA's legislative history. The court averred that § 1415(e)(4)(B) of the IDEA "clearly shows that Congress intended to permit cost and fee awards . . . . " *Id.* at 1120. Other than the prerequisite that costs may only be awarded to prevailing parties, neither *P.L.*, Rule 54, nor the legislative history of the IDEA suggests that costs other than attorneys' fees may be awarded *only* to parents and children who are prevailing parties. *See also Buser v. Corpus Christi ISD*, 20 IDELR 981, *aff'd* 51 F.3d 490 (5th Cir. 1995), *cert. denied* 116 S.Ct. 305 (1995) (costs awarded to school district in IDEA action, upheld on appeal); *Bonnie F. v. Calallen ISD*, 835 F.Supp. 340, 351-52 (S.D. Tex. 1993), *aff'd* 40 F.3d 386 (5th Cir. 1994), *cert. denied* 115 S.Ct. 1796 (1995) (costs and attorneys' fees awarded to school district in IDEA action, upheld on appeal); *Teague ISD v. Todd L.*, Civ. No. W-91-CA-276 (W.D. Tex. 1992), *aff'd*, 999 F.2d 127 (5th Cir. 1993) (costs awarded to school district, upheld on appeal).

In arguing that the legislative history of the IDEA and the EHA precludes an award of costs to a school district, Petitioners urge that only "parents or legal representatives," as prevailing parties, are entitled to costs. Petitioners go on to state that Federal Rule of Civil Procedure 54 itself is in conflict with the IDEA and must be disregarded in any case brought under the Act. However, the IDEA places no restriction upon the application of Rule 54.

Petitioners also cite *Jenkins v. Squillacote*, 935 F.2d 303 (D.C. Cir. 1991), in support of their argument that the district court's award of costs was improper. In *Jenkins*, the parents of a disabled child brought suit under the IDEA challenging the child's placement. At an administrative hearing, the school district's notice regarding the child's placement was found to be deficient. Subsequently, another hearing examiner ordered that the school district pay for the child to be placed in a private placement for the upcoming school year. The school district appealed. The district court overturned the hearing officer's decision and the school district sought reimbursement for the private placement tuition costs it had paid to the parent pursuant to the hearing officer's order. *In dicta*, the court noted that "[i]t would be absurd to imagine a trial court ordering parents to reimburse a school system for the costs of a *hearing examiner's* erroneous placement of their child . . ." *Id.* at 307 (emphasis added). The *Jenkins* dicta discusses whether a school district that is successful in an appeal can recoup as reimbursement the money it paid for tuition expenses for a parents' placement of a child in a private program, not costs awarded pursuant to Rule 54. The hearing officer upheld the placement and was later overturned by a district court. *Jenkins* is clearly distinguishable from the case at hand. Neither in *Jenkins*, nor the cases cited therein, does any party seek *costs pursuant to Rule 54*. Accordingly, the court's dicta in *Jenkins* is totally inapplicable to this case.

Petitioners finally contend that "[t]he statute specifically limits awarding school districts or the state to situations where the parents brought a suit that was frivolous, unreasonable or without foundation." Under Rule 54, costs other than attorneys' fees may be allowed as a matter of course to the prevailing party unless the court otherwise directs. Nothing in the language of Rule 54 nor the IDEA nor its legislative history

requires that a parent or child bring a frivolous suit in order for a district court to appropriately award costs other than attorneys' fees to a school district. The legislative history cited by the Petitioners states that a prevailing school district's *attorneys' fees* may be taxed against a parent who brings a suit which is "frivolous, unreasonable or without foundation." The legislative history cited by the Petitioners, however, contains no restrictions regarding the normal application of Rule 54. *See* 4 U.S. Code Cong. & Admin. News 1798-1810 (1986); *see also* 2 U.S. Code Cong. & Admin. News 1425-1508 (1975).

CONCLUSION

This is not a case involving questions of constitutional magnitude or the interpretation of a school district's legal responsibilities under the IDEA. First and foremost, this case is a fact-intensive dispute in which the Petitioners now seek a third review of the evidence.

Neither does the case represent a split in decisions among the courts of appeals regarding the treatment of the administrative hearing decision by a district court. Although the specific terminology used by the courts of appeals may differ, all recognize that the IDEA itself sets the standard for review by requiring an independent decision by the district court based on a preponderance of the evidence.

The award of costs to the school district by the district court and the Fifth Circuit Court of Appeals is not an abuse of discretion. It is specifically allowed by Rule 54 and not barred by the IDEA or its legislative history.

The scarce judicial resources of this Court should not be used on this case which is, at its heart, a dispute over the interpretation of evidence. For all of the foregoing reasons, the petition for writ of certiorari should be denied.

DATED: November 20, 1997.

Respectfully submitted,

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